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tober 15, 1985

Title: Delynda Ann Ricker Barker Reed, Appellant  
V.  
Princes Ann Ricker Campbell, Individually, and as  
Administratrix of the Estate of Prince Rupert  
Ricker, Deceased

Court: Court of Appeals of Texas,  
Eighth Supreme Judicial District

Counsel for appellant: McNally, R. Stephen

Counsel for appellee: McCollum, Paul, Baldwin Jr., Fletcher N.

EDITOR'S NOTE

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try	Date	Note	Proceedings and Orders
1	Oct 15 1985	G	Statement as to jurisdiction filed.
2	Nov 18 1985		Motion of appellee Princess Ann Ricker Campbell to dismiss or affirm filed.
3	Nov 20 1985		DISTRIBUTED. December 6, 1985
4	Dec 9 1985		PROBABLE JURISDICTION NOTED. *****
5	Jan 18 1986		Joint appendix filed.
7	Jan 23 1986		Order extending time to file brief of appellant on the merits until January 31, 1986.
9	Feb 1 1986		Brief of appellant Delynda Ann Ricker B. Reed filed.
0	Feb 18 1986		Record filed.
1	Mar 5 1986		Brief of appellee Princess Ann Ricker Campbell filed.
2	Mar 14 1986		SET FOR ARGUMENT, Wednesday, April 30, 1986. (2nd case)
3	Mar 24 1986		CIRCULATED.
4	Apr 7 1986		Application for leave to file a reply brief in excess of the page limitation filed (A-774), and order denying same by White, J., on April 15, 1986.
5	Apr 7 1986		
6	Apr 23 1986	X	Reply brief of appellant Delynda Ann Ricker B. Reed filed.
7	Apr 30 1986		ARGUED.

85-755

Supreme Court, U.S.

FILED

OCT 18 1985

NO. \_\_\_\_\_

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\*\*\*\*\* JOSEPH E. CAMPBELL, JR. CLERK \*\*\*\*\*

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

\*\*\*\*\*

DELYNDA ANN RICKER BARKER REED, APPELLANT  
V.  
PRINCES ANN RICKER CAMPBELL, INDIVIDUALLY,  
AND AS ADMINISTRATRIX OF THE ESTATE OF  
PRINCE RUPERT RICKER, DECEASED, APPELLEES

\*\*\*\*\*

ON APPEAL FROM THE COURT OF APPEALS FOR THE  
EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

\*\*\*\*\*

JURISDICTIONAL STATEMENT

\*\*\*\*\*

R. STEPHEN McNALLY

P.O. BOX 1586

AUSTIN, TEXAS 78767-1586

(512) 474-1397

COUNSEL OF RECORD FOR APPELLANT

134



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QUESTIONS PRESENTED

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RETROACTIVITY QUESTIONS:

1. Should Delynda benefit from the holding of this Court in Trimble v. Gordon under the test of Chevron v. Huson?

2. Should Delynda be denied the benefit of the holding of this Court in Trimble v. Gordon under the "date-of-filing" test applied by the court below?

3. Should retroactivity of Trimble be determined by whether the claim was filed in an open estate or as a collateral attack on a closed estate?

LEGITIMATION QUESTION:

4. Does the Fourteenth Amendment require an opportunity for Delynda to legitimate herself equivalent to the statutory procedures arbitrarily denied her?

SEXUAL CLASSIFICATION QUESTIONS:

5. Where maternal heirship requires only a preponderance of the evidence, while paternal heirship is not allowed, is the distinction permissible?

6. Was the denial of Delynda's heirship from Prince Ricker justified in light of the jury's unchallenged finding of paternity and the convincing proof at trial?

\* see list of parties below

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\* In addition to the parties listed in the caption, the following Appellees were also Appellees in the state action:

1. Rosemary Jane Ricker Farrell,
2. Prince Ricker, Jr.,
3. Bretta Drayton Ricker, and
4. Mark Ricker

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REFERENCE TO ALL REPORTS OF OPINIONS  
DELIVERED IN THE COURTS BELOW

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The published opinion and denial of rehearing by the Court of Appeals, Eighth Supreme Judicial District of Texas (appendix A, infra) is reported as: Reed v. Campbell, 682 S.W.2d 697 (Tex.App.--El Paso, 1984, writ ref'd, n.r.e.).

The Texas Supreme Court's refusal of application for writ of error, noting "no reversible error", (appendix A, infra), is published in the advance sheets, 691 S.W.2d, No.2, p.8.

The following orders are unreported: order of the state district court denying Appellant heirship (appendix A, infra), orders of the Court of Appeals overruling Appellant's motion and amended motion for rehearing (appendix A, infra), and order

of the Texas Supreme Court overruling Appellant's amended motion for rehearing, (appendix A, infra).<sup>9</sup>

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GROUNDS OF JURISDICTION

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This direct appeal is taken from a state court judgment of the Texas Court of Appeals, Eighth Supreme Judicial District, denying heirship on the basis of illegitimacy. Delynda made a Motion for Judgment on the verdict based on the unconstitutionality of the statute. Judgment was entered for Appellees on December 19, 1984. Appellant's motion and amended motion for rehearing were denied on January 23, 1985. The Texas Supreme Court refused Appellant's application for writ of error on June 5, 1985. The Texas Supreme Court overruled Appellant's

amended motion for rehearing on July 17, 1985. At trial and throughout the appeals in the state courts, Appellant has attacked the statutes denying her heirship on the grounds that they violate the Fourteenth Amendment.

Notice of appeal was filed with the Clerk of the Texas Court of Appeals, Eighth Supreme Judicial District, on September 27, 1985.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2). Past cases striking down similar statutes have come before the Court on appeal. The statutes provided relief from the bastardy rules of feudal common law, but arbitrarily excluded certain claimants. A few state courts have struck down the common law itself as unconstitutional. If the Court believes the appeal is improvident, the Court is requested to regard and

act on the papers of the appeal as on a petition for writ of certiorari duly presented at the time the appeal was taken, as provided by 28 U.S.C. §2103.

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CITATION OF CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED

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Appendix B, infra, sets forth:

1) the Equal Protection Clause of the Fourteenth Amendment;

2) TEX. PROB. CODE. §37 (Vernon, 1980);

3) TEX. PROB. CODE, Ch.55, §42, 1955 TEX. GEN. & SPEC. LAWS 88, 102, amended by Act of May 28, 1977, ch. 290, § 1, 1977 TEX. GEN & SPEC. LAWS, 762, 762-63;

4) TEX. PROB. CODE, Ch. 290, §1, 1977 TEX. GEN. & SPEC. LAWS, 762, 762-63, amended by Act of March 22, 1979, Ch. 24,

§ 25, 1979 TEX. GEN. & SPEC. LAWS 35, 40;

5) TEX. PROB. CODE §42 (Vernon 1980);

6) TEX. FAM. CODE, Ch. 476, §24, 1975  
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2537;

7) TEX. FAM. CODE, Ch. 674, §2, 1981  
TEX. GEN. & SPEC. LAWS 2536, 2537 amended  
by Act of June 19, 1983, Ch. 744, §1, 1985  
TEX. GEN. & SPEC. LAWS 4530, 4530-31;

8) TEX. FAM. CODE ANN. §13.01 (Vernon  
Supp. 1975-1985); and

9) TEX. FAM. CODE ANN. §13.02 (Vernon  
Supp. 1975-1985).

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STATEMENT OF THE CASE

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Facts

Delynda Ann Ricker Barker Reed is the Appellant. Her natural father was Prince Ricker.<sup>1</sup> This case involves an appeal from an order denying Delynda heirship in Prince Ricker's estate. Appellees are the children of Prince Ricker's various valid marriages.

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1. The evidence of Prince's paternity at trial was clear and convincing. Delynda's birth certificate listed Prince Ricker as her father. Delynda is a "perfect cross between her mother and Prince" in the opinion of Prince Ricker's sister, an opinion supported by comparison of pictures such as P.Ex. 2, 8-13, and 17. When he married Delynda's mother, Prince Ricker agreed that they would be husband and wife. After Prince Ricker's ceremonial marriage he moved his personal things into the house which Delynda's mother shared with her mother in Big Spring.



Delynda's parents were married at Thanksgiving, 1957, eleven months before Delynda was born. Their marriage was invalid because Delynda's father was not then divorced from his first wife. The divorce was pending when Delynda's parents

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shared with her mother in Big Spring. Delynda's mother's maid testified that she was responsible for doing Prince Ricker's laundry after the wedding. The couple were listed together at that address in the city directory. Delynda's mother testified at the trial that she had sexual relations only with Prince Ricker from their wedding until after Delynda was born. Prince Ricker sometimes admitted only that he could have been Delynda's father. At other times throughout his life, he confided that he was the father. An alcoholic, he wrote in his AA work that he was the father, reasonably sure, of a child born out of wedlock. He explained to his sister that this meant Delynda, who was his as much as "Prinnie" or "Muggie" (two of the Appellees). He explained that this was one of his faults that he was sorriest for, that he had never done anything for Delynda. On this occasion, he echoed the testimony of Delynda's mother that "there

married. The decree of divorce from his first marriage was entered on February 28, 1958. Delynda was born eight months later, on November 1, 1958. Her birth certificate showed the name of her natural father, Prince Ricker, and stated that her birth was legitimate.

Delynda was adopted in 1966 by her mother's new husband, Gerry Barker. Delynda's natural father received the adoption papers and asked for advice concerning her adoption. Prince Ricker decided to "do it", based on his approval of Mr. Barker.

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was no one else" who could have been the father. The evidentiary basis of the finding of paternity was not attacked by Appellees in any of the state courts.

Adoption in Texas severs all legal relationship between parent and child, except that the right of a legitimate child to inherit directly from its natural parent is not extinguished.

Delynda's natural father died on December 22, 1976, and Appellee was appointed administratrix of his estate the next day. The estate has since remained in open administration. Four months later, in April 1977, the opinion of this Court in Trimble v. Gordon, 430 U.S. 672 (1977), was handed down. Trimble removed any shadow of doubt that the Texas probate code, by posing an insurmountable barrier to heirship of illegitimate children, violated the guarantee of equal protection. The probate code was amended later in 1977, and again in 1979 to allow inheritance by legitimated children, but no opportunity was ever afforded for Delynda to be legitimated.

The questions presented in this Court were presented and ruled on by the courts below as set out below.

Delynda filed an application to determine her heirship in the ongoing administration of her natural father's estate. Appellees filed a motion for summary judgment that Delynda should not inherit because she had not been legitimated by a valid marriage of her parents or under the statutory procedures of the Family Code. They pointed out that Delynda's claim for legitimation under the family code was barred by limitations. Delynda responded that issues were raised as to whether she was her father's child, whether she was illegitimate, and whether suit to establish paternity had been filed in time. The court refused summary judgment and set the case down for trial.

At trial, the jury found that Delynda is the child of Prince Ricker, and that he had married Delynda's mother. Delynda made a motion for judgment on the finding of paternity, based on the invalidity of the statutory discrimination against illegitimate children under the Federal Constitution. Appellees moved for judgment on two grounds: (1) that Trimble v. Gordon had not been applied retroactively where the death was before Trimble was handed down and the claim for heirship was filed afterward; and (2) that Delynda could not inherit without being legitimated, and that limitations barred her legitimation. The trial court overruled Delynda's motion, and entered judgment for Appellees, without opinion.

Delynda perfected an appeal to the state Court of Appeals in El Paso. In every brief and motion for rehearing filed

in that court or in the Texas Supreme Court, she has raised the Fourteenth Amendment issues presented here: (1) that the rule applied in Trimble should be applied to the determination of her heirship where she applied to the open and pending estate; (2) that the legitimation requirement of the amended statute invalidly posed an insurmountable barrier in her case, and (3) that the denial of heirship discriminated invidiously based on the sex of her deceased parent.

The state court of appeals affirmed the denial of Delynda's heirship, with written opinion, and denied rehearing. Its rationale for applying the insuperable barrier was that Trimble had not been given retroactive effect where the father died before Trimble and the claim was filed after Trimble. It held that the insurmountable barrier in the amended sta-



tute was constitutional because supported by "a rational state basis". In doing so, however, it declined to hold that Delynda could have inherited even if she could have been legitimated. The court of appeals did not directly address the validity of the sexual basis of the statutory classification.

The Texas Supreme Court, without written opinion, refused to review the case on application for writ of error, noting "no reversible error", and denied rehearing.

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#### SUBSTANTIALITY OF QUESTIONS PRESENTED

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#### OVERVIEW

This section is divided into three parts. The first part addresses issues raised by the refusal to apply Trimble v.

Gordon retroactively. The second part sets out the substance of the denial of heirship through legitimation. The third part discusses the substance of the blanket denial of heirship based on the sex of the decedent.

The first two parts discuss issues which the Court has already deemed substantial and has decided. The third part discusses the similar state and individual interests involved in exclusions based on sex. The discussion of interests in the third part is generally applicable to parts one and two as well.

Each of the three parts begins by restating the relevant questions and then gives a list of reasons that justify the substantiality of the questions. A discussion justifying the reasons and addressing the issues completes each section.

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PART I.

TRIMBLE QUESTIONS RESTATED

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1. Should Delynda benefit from the holding of this Court in Trimble v. Gordon under the test of Chevron v. Huson?

2. Should Delynda be denied the benefit of the holding of this Court in Trimble v. Gordon under the "date-of-filing" test applied by the court below?

3. Should retroactivity of Trimble be determined by whether the claim was filed in an open estate or as a collateral attack on a closed estate?

SUBSTANTIALITY OF  
THE RETROACTIVITY ISSUE

(1) The retroactive effect of a prior decision by this Court is at issue. The Court has already recognized the Equal Protection issues as substantial by deciding Trimble.

(2) The issue of retroactivity is sufficiently complex that the lower courts have taken irreconcilable positions, warranting plenary consideration.

(3) The retroactivity of Trimble invokes the supervisory duties of this Court over lower courts. Supervision is needed in order to insure that decisions of this Court are not circumvented through holdings of prospectivity unjustified under Chevron v. Huson, 404 U.S. 97 (1971).

(4) There is a manifest need for guidance from this Court in distinguishing direct appeals and collateral attacks in applying Chevron.

SUMMARY OF TRIMBLE DISCUSSION

At least three cases would accord Delynda the benefit of the Court's ruling in Trimble v. Gordon, 430 U.S. 762 (1977). Three cases, including the decision below, would apply the unconstitutional statute to Delynda's case, Trimble notwithstanding. Many cases leave the applicability of Trimble in this case open to question.

The opinions that would apply Trimble are better reasoned. These decisions consider and weigh the factors set out by this Court in Chevron v. Huson, 404 U.S. 97 (1971). The Chevron test weighs the hardship of litigants who have relied on the old rule against the purpose of the new rule and the hardship of those deprived of the benefit of the new rule.

Some courts have addressed the role that closure of the estate plays in

causing reliance on the old statute. Often, no reliance was found where the claim was brought in an open estate. The equities have been held to favor application of Trimble in an open estate by courts which have applied the Chevron test. In Texas, the Probate Code itself guards against any significant hardship from reliance on the invalid statute. The Code's provisions relating to the pendency and finality of probate are well designed to minimize the chance of damage from justified reliance.

The purpose of Trimble was to set aside denials of inheritance rights which were not substantially related to order in probate. This interest is served by setting aside the statute where the death was before Trimble and the estate was open when the claim was brought.



For these reasons Trimble has, with the exceptions noted, been applied to claims brought in open estates, but denied in collateral attacks on closed estates. Delynda's appeal is from denial of an application for heirship she filed in the open and ongoing administration of her father's estate. Under the analysis this Court set down in Trimble and Chevron, an insurmountable judicial barrier to her heirship should not have replaced the statutory one. Such a barrier is not substantially related to order in probate.

DECISIONS OF THE LOWER COURTS ON THE ISSUE OF RETROACTIVITY OF TRIMBLE USE DIFFERENT REASONING TO REACH IRRECONCILABLE RESULTS.

This Court has treated Trimble as retroactive without specifically writing to the issue.<sup>2</sup> Decisions in the lower courts have adopted irreconcilable approaches. Three decisions, including the case at hand, have applied the invalid statute where the claim was brought in open probate.<sup>3</sup> Three decisions have applied Trimble in an open estate in the exact chronological posture of the case at

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2. Trimble v. Gordon and Lalli v. Lalli, briefed in Appendix C.1, infra. In addition to Lalli this Court vacated and remanded the case of Pendleton v. Pendleton, 421 U.S.911 (1977), to the Supreme Court of Kentucky where the Court held the claimant entitled to inherit on the authority of Trimble.

3. Reed v. Campbell, Compton v. White, Ford v. King, all briefed at appendix C.26 et. seq., infra.

hand; first death, then Trimble, then the filing of the claim.

The other decisions conflicting on the retroactivity of Trimble lend themselves to being harmonized. Courts faced with a collateral attack seeking to reopen a closed estate have stated that Trimble would apply prospectively.<sup>4</sup> These courts have often used broad language which failed to distinguish the situation of a direct attack. These statements were dicta to the extent that they might apply to open estates. Some of these courts have modified their holdings when pre-

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4. Marshall v. Marshall, Estate of Sharp, and Gross v. Harris briefed infra at appendix C.5 et. seq.

5. These cases are briefed infra at appendix C.14 et. seq.

sented with a claim presented in an open estate.<sup>6</sup>

Similarly, courts deciding a claim raised in the ongoing administration of the open estate have applied Trimble to deaths which occurred prior to that decision, except for the three cases noted above, infra, p. 21, n. 3. The plurality of these cases have applied Trimble analysis without specifically addressing the retroactivity issue.<sup>7</sup> Other decisions have applied Trimble by finding that the issue was in litigation before Trimble. These cases have in dicta indicated that

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6. Marshall v. Marshall, (App. C. 9 et. seq., infra, for example, abandoned the contrary dicta in an earlier decision to allow retroactive application in an open estate when the issue came before it.

7. These cases are briefed in the appendix at C.1 et. seq., infra.

the invalid statutes would apply to claims not in litigation when Trimble came down.<sup>8</sup>

Louisiana applies equal protection in probate retroactively to the date of its new constitution effective at the end of 1974.<sup>9</sup>

One case involved retroactive application in a collateral attack. The Kentucky case of Pendleton v. Pendleton 431 U.S. 911 (1977), was vacated and remanded by this Court when it decided Trimble. On remand, the Kentucky Supreme Court apparently failed to appreciate the significance of the procedural difference between the cases. Pendleton v. Pendleton, 560 S.W.2d 538 (Ky. 1972). Trimble involved a claim in open probate.

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8. These decisions are briefed in the appendix at C.17 et. seq., infra.

9. Succession of Clivins adopting the current Louisiana position, is briefed in the appendix infra at C.21 et. seq.

The court very reluctantly gave the illegitimate claimant the benefit of the Trimble ruling.<sup>10</sup>

Lower courts have failed to consistently apply the Chevron analysis. The departure of the lower court from the equal protection and retroactivity rules set out by this court highlights the need for plenary review in this cause.

\* \* \*

THE TEST OF CHEVRON v. HUSON REQUIRES THAT TRIMBLE BE APPLIED RETROACTIVELY TO THE CASE AT HAND.

The three-element test for determining the retroactive application of civil decisions of this Court is set out in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

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10. Pendleton is briefed in the appendix, infra, at C.24 et. seq.

"In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, \* \* \* or by deciding an issue of first impression whose resolution was not clearly foreshadowed, \* \* \* Second, it has been stressed that "we must \* \* \* weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." \* \* \* Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."



ANY HARDSHIP TO THE OTHER HEIRS FROM APPLYING TRIMBLE DOES NOT AFFIRMATIVELY OUTWEIGH THE HARDSHIP TO DELYNDIA OF DENYING HER HEIRSHIP UNDER THE DISCRIMINATORY STATUTE.

The case which has most carefully scrutinized the third element of Chevron is Marshall v. Marshall 670 S.W.2d 213, (Tenn. 1984). Marshall held that "prospective only" application of an overruling decision "should be limited to a case in which the hardship on a party who has relied on the old rule outweighs the hardship on the party denied the benefit of the new rule . . ." Id. at 215.

Chevron requires that the equities of those relying on the old rule must outweigh Delynda's equities so greatly that the balance outweighs the purpose of fairness which motivates Trimble.

Marshall found the reliance of passive heirs under a discriminatory statute to be absent.

The defendants in the instant case have not acted in reliance upon the precedent overruled by Allen, they merely assert that they have passively acquired rights as the heirs at law of an intestate property owner; they are not innocent purchasers for value of the property they seek to claim; and, neither do they assert the rights of those who claim under a valid court decree that has determined the identity of the heirs at law of an intestate property owner. Marshall v. Marshall, 670 S.W.2d 213, 215 (Tenn. 1984).

The Appellees in the present case, like those in Marshall, have not acted and should not have acted in such reliance on the invalid statute as to justify denying Delynda the right to inherit from her father.

The absence of hardship based on reasonable reliance is underscored by the Texas Probate Code chapters relied on by

Appellees. Where consistent with the Fourteenth Amendment, Chapter II controls Descent and Distribution in Texas. Chapter III, with the same reservation, controls the Determination of Heirship. Chapter II, specifically §37, safeguards against undue reliance on an opinion about heirship not finally determined by judgment. Section 37, set out in full in Appendix B, pp.1-2, infra, provides that the administrator shall hold the estate "in trust to be disposed of in accordance with the law". The manner required by law is determined by the probate court at the time that it enters a final judgment closing the probate of the estate. Persons choosing to deal with the estate, before heirship is finally determined, do so with notice that additional heirs may appear. The estate is held in trust for the benefit of all such heirs. In an open

estate, therefore, no reliance by third parties is justified or likely.

After a final judgment is entered, §55 of Article III provides protection for those reasonably relying on the judgment.

Under these circumstances, reliance on an expectation of heirship becomes rationally justifiable only when the estate is closed. Even before illegitimate children were declared to be "persons" within the meaning of the Fourteenth Amendment, inheritance expectancies were subject to the appearance of additional marital heirs.

It would be almost a Catch-22 ruling to hold that Delynda may inherit from her father notwithstanding the invalid statute, but will be denied heirship because of the passive mental expectancies of her

half brothers and sisters under the invalid statute. .

The reality of Delynda's case is that there are seven heirs of Prince Ricker, and one, Delynda, has been held illegitimate. The monetary effect on Delynda of the denial of legal heirship is that she loses all of the share which she would otherwise receive. The effect on the other six heirs is that they divide among themselves the portion which the statute denies Delynda. With Delynda removed as the seventh heir, the share of each of the remaining six is increased from one-seventh to one-sixth of the estate. The greater practical impact on Delynda is clear.

THE PURPOSE OF TRIMBLE STRONGLY  
FAVORS ITS APPLICATION IN THE OPEN AND  
PENDING ESTATE OF DELYNDA'S FATHER

Trimble held invalid a classification based on illegitimacy because it cut more broadly than was required to serve the state's interest in order in probate. The purpose of Trimble is thus one that speaks with unusual eloquence to the issue of retroactivity. This court should not draw a retroactivity distinction which, if drawn by a statute, would be invalid under Trimble. The purpose of Trimble demands that equal access to protection of its rule be limited only by a classification substantially related to the need for order in probate.

Gross v. Harris, 664 F.2d 667 ( 8th Cir. 1981):

It is self-evident that the purpose of the Trimble decision was to prevent constitutionally impermissible discrimination against illegitimates. Retrospective application of Trimble would further the Trimble purpose.

The purpose of denying the retroactive effect of Trimble is not substantially related to refusal of a claim filed in open and pending probate. Retroactive application of Trimble will result in the estate's simply being closed by a judgment vesting title in seven heirs, rather than six. The judgment will enjoy the same protection from collateral attack if Delynda is included as an heir as it would otherwise. The distinct state interests of orderly probate, recognized by the Texas statutes as applying to closed estates, are not involved here. Finality of judgment is the event upon which the



state interest in orderly probate attaches. Succession of Trosclair 423 So.2d 745 (La.App. 1982), Estate of Sharp 163 N.J. Super. 148, 377 A.2d 730 (N.J. Ch. 1977) affirmed as modified, 394 A.2d 381 (N.J. App. 1978), Marshall v. Marshall 670 S.W.2d 213 (Tenn. 1984).

The classification proposed by the court below to disinherit Delynda is itself a violation of the Equal Protection Clause. Whether the claim of the illegitimate child was on file before the particular date in 1976 when Trimble was announced has no rational relevance to regular devolution of estates. No reason has been explained in any of the many cases applying this rule why it should matter when the claim was filed, or to whom. The date the claim was filed does not bear the substantial relation to issues such as whether the estate could

have been spent, sold, or mortgaged to a third party in good faith. Whatever its genesis, a rule focusing on the date of the claim was created and has been adhered to in dicta by a very large number of cases addressing the application of Trimble to deaths before its effective date.

TRIMBLE DID NOT PRESENT A CHANGE IN THE LAW SUFFICIENT TO JUSTIFY THE DENIAL OF RETROACTIVITY.

Trimble is sometimes viewed as impliedly overruling Labine v. Vincent, 401 U.S. 532 (1971). In fact, the Labine court sustained the Louisiana statute precisely because the child could have inherited in intestacy without a marriage of the parents. The Louisiana statutes, unlike those of other states, accorded an illegitimate child a right to alimony in

its father's estate. The Labine Court wrote:

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion \* \* \* that Louisiana has barred this illegitimate from inheriting from her father. Ezra Vincent \* \* \* could have awarded his child the benefit of Louisiana's intestate succession statute on the same terms as legitimate children simply by stating in his acknowledgment of paternity his desire to legitimate the little girl. Id. at 539.

Reliance on the proposition that Labine did not mean what it said when it tied its decision to the availability of nonmarital legitimation was unwarranted. It became increasingly unwarranted as subsequent cases uniformly struck down statutes which posed insurmountable barriers.

Labine did not hold that state probate statutes were above constitutional review, though it was accused of doing so by the dissent. The dissent made that

charge because such a position would have been in clear conflict with the Supremacy Clause and the Fourteenth Amendment. In fact, however, Labine upheld the Louisiana statute in the absence of an insurmountable barrier.

The Trimble opinion was a scholarly decision which predictably applied the analysis developed in earlier cases, particularly Mathews v. Lucas, 427 U.S. 495 (June 1976). The majority in Mathews stated that

Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited, see Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), in which case appellees would be made eligible for benefits under section 416(h)(2)(A). Id. at 515, N.18.

This explicit recognition of the possibility and effect of a successful attack on discriminatory state intestacy

laws was an additional and unmistakable foreshadowing of Trimble. All the illegitimacy cases, other than Labine and Mathews, cited by Trimble upheld the equal protection attack, and to that extent they clearly foreshadowed the result in Trimble as well.

Trimble cannot be held unforeseeable when it was possible that the Labine court would have struck down the Illinois statute. Labine cannot be credited with creating even a doubt that insurmountable barriers might pass constitutional muster. In any case, the rational basis test applied by Labine had clearly been abandoned before Trimble. For these dual reasons, therefore, the decision in Trimble was not a change sufficiently significant to justify denial of retroactive effect.

## THE TWO COMPETING TESTS

Several approaches have been taken toward defining Trimble's retroactivity, as documented by appendix "C", infra. The Chevron test is one which has been mandated by this Court. Chevron is followed in deciding the retroactivity of state decisions because of the force of its reasoning. The test applied by the court below, on the other hand, has very little to recommend it, even though it is followed, or at least stated, in a great number of cases. Widespread use of this "date-of-claim" test has masked the important distinction between a collateral attack on a closed estate and a direct appeal involving an open estate.

Use of the Chevron test, however, makes it clear that a retroactive application of Trimble to direct appeals in open

estates preserves Equal Protection interests, while leaving untouched the state interest in an orderly probate. The use of a competing test raises a substantial question. This Court has the jurisdiction and duty to decide the extent of retroactivity of its own decisions. It should do so.



---

PART II.

LEGITIMATION QUESTION RESTATED

---

4. Does the Fourteenth Amendment require an opportunity for Delynda to legitimate herself equivalent to the statutory procedures arbitrarily denied her?

\* \* \*

SUBSTANTIALITY OF

THE DENIAL OF LEGITIMATION

(1) The Court found a substantial issue presented in Pickett v. Brown, 103 S.Ct. 2199 (1983). The issue here is more substantial. Delynda has been afforded no chance whatever to legitimation.

(2) The decision of the Court below is in direct conflict with Pickett. It did not apply the two-part test set down in Pickett, but an irreconcilable and

inappropriate test, sustaining the statutes solely by holding them supported by a "rational state basis".

(3) The refusal by the court below to apply the Pickett test is essential to its result, since the statutory barriers it sustained must fall under Pickett.

(4) The decision below is poor precedent in upholding classifications against illegitimates based on purely fortuitous events which were unrelated to any state interest in the orderly disposition of estates.

(5) The opinion of the court below upholding the exclusion, to the extent based on death, conflicts with the decision of the Eleventh Circuit in Herron v. Schweiker, 697 F.2d 999 (Eleventh Cir. 1983).

## SUMMARY OF LEGITIMATION DISCUSSION

Delynda's rights to legitimation were denied in the present case based on one or more classifications, each of which, in the posture of this case, posed an insurmountable barrier to her heirship. A statute which poses an insuperable barrier fails the first element of the test for substantial relation to an important state interest. Additionally, each of the classifications which could have been applied to deny legitimation to Delynda is not even rationally related to the state interest in order in the distribution of estates.

THE FOURTEENTH AMENDMENT REQUIRES THAT DELYNDAL RECEIVE AN OPPORTUNITY TO LEGITIMATE HERSELF EQUIVALENT TO THAT FROM WHICH SHE WAS EXCLUDED BY THE ARBITRARY

## STATUTORY CLASSIFICATION

### The Equal Protection Requirements

Two requirements of equal protection were set out by this Court in Pickett v. Brown, 103 S.Ct. 2199, 2206 (1983). A classification will be struck down if it does not provide a reasonable opportunity for those excluded to bring a suit to establish a relationship to their father. Additionally, the statute will fall unless substantially related to an important state interest.

### The Statutes

The operative statutory classification appears in the 1979 amendment to §42(b) of the Texas Probate Code which, for the first time, allowed inheritance to those who had been "legitimated by a court decree as provided by Chapter 13 of the Family Code".

Chapter 13 legitimation was never available to Delynda because she was born before the 1975 effective date of the amendments to the Family Code which created the legitimation action. Wynn v. Wynn, 587 S.W.2d 790 (Tex. Civ. App. --Corpus Christi, 1979, no writ).

Delynda is statutorily excluded from the constitutionalizing 1979 amendment by §37 of the Probate Code. Section 37 has been held to apply the code sections in effect at the time of the father's death to the heirs of an estate.

#### The Court Below

The lower court, at p.700 of its reported opinion, disposed of this Equal Protection attack as follows:

Even if the Plaintiff could claim under Section 42(b) as amended, her exclusion from the inheritance under that statute does not deny her constitutional equal protection since

a rational state basis supports that legislation.

#### DISCUSSION

It was setteled in Pickett v. Brown, 103 S.Ct. 2199 (1983) that a denial of rights based on the classification of illegitimacy denies equal protection if 1) no reasonable opportunity is provided for the illegitimate class to share in the rights accorded to others, or 2) the classification of illegitimacy is not substantially related to an important state interest.

Sections 37 and 42(b) of the Texas Probate Code, in conjunction with Chapter 13 of the Texas Family Code, do not satisfy the Pickett requirements.

Texas Probate Code §37 vests a decedents property rights "immediately" in his heirs at law. Case law has established that under §37, the law in effect at the

time the decedant died will normally control the devolution of his estate.

Prince Ricker died in 1976, when the inheritance rights of illegitimate children came under the 1955 version of §42 of the Probate Code. The original §42 required a marriage for the child to inherit. In 1979, in an attempt to constitutionalize §42, it was amended to allow inheritance if the child was "legitimated by a court decree as provided by Chapter 13 of the Texas Family Code."

Sections 37 and 42, as interpreted by the court below, require that Delynda's case be decided under the unconstitutional 1955 version. They therefore place an insurmountable barrier in the path of Delynda's heirship. Section 37 therefore operates to revive, at the time of trial, the unconstitutional and repealed version



of §42. It therefore fails the insurmountable barrier prong of the Pickett test. Section 37, the chronological choice-of-statute rule, is invalid because it attempts to invoke and apply by reference the unconstitutional barrier of another statute, the original enactment of §42. Looking beyond §37, Delynda is entitled to any relief which she would have been entitled to if the current §42 had been in effect when her father died.

Wynn v. Wynn, 587 S.W.2d 790 (Tex. Civ. App. --Corpus Christi, 1979, no writ) is one of the many Texas cases recognizing that those born before the effective date of the 1975 amendments were excluded from any right to bring an action under the statute.

Under Family Code §13.08, issuance of a decree of legitimation is mandatory upon

the finding of the jury that the alleged father is the father of the child. The decree, under Probate Code §42(b), entitles the child to inherit from the father.

Delynda secured a finding by the jury at trial establishing her relationship with Prince Ricker.

Delynda could not bring an action under the Family Code while her father was alive because the statutory action was not available to her. Wynn v. Wynn, 587 S.W.2d 790 (Tex. Civ. App. --Corpus Christi, 1979, no writ).

Proof of paternity during the lifetime of the parent is not required of a legitimate child. The justifiability of such a requirement, judicially engrafted into a statute which seemed neutral on the point, was rejected in Herron v. Schweiker, 697 F.2d 1001 (Eleventh Cir.

1983), applying a test very similar to that set out in Pickett. In that case, as in the case at hand, a lifetime requirement would have denied any reasonable opportunity to bring the action. The court rejected the argument that the problems of proof could form the basis for an insurmountable barrier to heirship.

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### PART III.

#### SEXUAL CLASSIFICATION QUESTION RESTATED

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5. Where maternal heirship requires only a preponderance of the evidence, while paternal heirship is not allowed, is the distinction substantially related to an important state interest?

6. Was the denial of Delynda's heirship from Prince Ricker justified in

light of the jury's unchallenged finding of paternity and the convincing proof at trial?

\* \* \*

SUBSTANTIALITY OF  
THE SEX-BASED EXCLUSION FROM HEIRSHIP

1. This question was previously reserved in Trimble v. Gordon, 430 U.S. 762 (1977). It is ripe for decision under the test set out in Pickett v. Brown, 103 S.Ct. 2199 (1983). The outright ban on heirship is invalid both because it is insurmountable and because it is not tuned even roughly to the presence or absence of problems of proof in any particular estate.

2. Less-onerous alternatives adequately serve the state interest in avoiding fraud or mistake in probate. Paternal heirship is allowed on proof by clear and convincing evidence under the

Uniform Probate Code. In Puerto Rico and the District of Columbia the traditional tools of the adversary system are regarded as sufficient to protect the probate process. These alternatives contrast with the untuned approach of the statute at hand.

3. Societal interests almost identical to those involved in this question have been deemed substantial in decisions of this Court. These include state interests in avoiding fraud and avoiding welfare dependency.

4. The interest of fairness to the innocent is doubly relevant where status of birth is not complicated by doubtful evidence of paternity in this particular case.

#### SUMMARY OF DISCUSSION

Although proof of maternity is

somewhat easier in general than proof of paternity, the difference does not justify a meat-axe exclusion of paternal heirship.

\* \* \*

TOTAL DENIAL OF PATERNAL INHERITANCE IS NOT SUFFICIENTLY RELATED TO FAIRNESS IN PROBATE TO VALIDLY BAR DELYNDA'S CLAIM.

Maternity is frequently easier than paternity to prove. This is a fact. Although it is not the fault of the non-marital child, and it complicates her task of establishing parentage, it is one which may form the basis for somewhat different rules regarding proof of motherhood and fatherhood. The general ease of proof of maternity is consistent with the rule allowing its proof by a preponderance. The fact that the father is male, however, does not mean that proof of parentage will never be clear or certain. The denial of

paternal inheritance in every case, therefore, is overbroad. There is nothing in the inherent differences between the sexes that justifies denial of heirship when the proof is clear.

Trimble v. Gordon 430 U.S. 762, 772, partly addressed this issue in the intestacy context. The court struck down the Illinois statute for excluding certain categories of illegitimate children unnecessarily. It held that for

at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under the intestacy laws.

Pickett v. Brown, 103 S.Ct. 2199 (1983), states a two-part test for analysis of illegitimacy classifications. The denial of rights must fall if it does not provide a reasonable opportunity to those

in the excluded class to establish a claim based on the merits of their individual case. The Court held such an opportunity the first essential element of a substantial relation to the state interests.

Clearly the meat-axe exclusion of paternal heirship has cut through the bone rather than the fat in the case at hand. The proof that Delynda is the natural child of her father is, at a minimum, sufficiently certain that any interest of the state in avoiding fraud or mistake is absent. The jury's finding of paternity, uncontested in the state courts, should resolve the issue of Delynda's heirship.



\*\*\*\*\*  
NOTICE TO TEXAS ATTORNEY GENERAL THAT  
28 U.S.C. 2403(b) MAY APPLY  
\*\*\*\*\*

As required by Rule 28.4(c), the Attorney General of the State of Texas is hereby advised that 28 U.S.C. 2403(b) may apply in this case, since the State of Texas is not a party and the appeal draws into question the constitutionality of a number of Texas statutes bearing on the inheritance rights of illegitimate children, specifically §42 of the Probate Code of 1955, §§37 and 42 of the current Probate Code, §§13.01 and 13.02 of the Family Code, and the scope of Chapter 13 of the Family Code as providing no legitimation for children born before it was adopted.

\*\*\*\*\*

Appellant respectfully submits that the cause presents substantial questions which invoke the statutory jurisdiction of this Court.

R. Stephen McNally

R. Stephen McNally  
Counsel of Record for Appellant  
P.O. Box 1586  
Austin, Texas 78767-1586

(512) 474-1397

APPENDIX A  
OPINIONS, JUDGEMENTS, ORDERS OF  
COURTS BELOW

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A. 1

**Delynda Ann Ricker Barker  
REED, Appellant,**

**v.**

**Princess Ann Ricker CAMPBELL, Individually and as Administratrix of the Estate of Prince Ricker, deceased, Appellee.**

**No. 08-83-00022-CV.**

**Court of Appeals of Texas,  
El Paso.**

**Dec. 19, 1984.**

**Rehearing Denied Jan. 23, 1985.**

Illegitimate daughter brought suit against administratrix to establish a share in estate of her natural father who died intestate. The 83rd District Court, Reagan County, William H. Earney, J., rendered take-nothing judgment against daughter, and she appealed. The Court of Appeals, Ward, J., held that: (1) illegitimate daughter could not inherit a share in estate of her natural father as a "recognized" illegitimate child; (2) jury's findings, leading to the conclusion that illegitimate daughter was not entitled to inherit a share in the estate of her natural father, were not erroneous as a matter of law, nor were they contrary to the great weight and preponderance of the evidence; and (3) illegiti-

mate daughter's exclusion from inheritance did not deny her constitutional equal protection.

Affirmed.

---

R. Stephen McNally, Austin, for appellant.

Paul McCollum, Kathleen McCulloch, Shafer, Gilliland, Davis, McCollum & Ashley, Odessa, for appellee.

Before WARD, OSBORN and SCHULTE, JJ.

### OPINION

WARD, Justice.

The Plaintiff Delynda Ann Ricker Barker Reed appeals from a take-nothing judgment rendered against her in her suit to establish a share in the estate of her natural father Prince Ricker. Prince Ricker died intestate and the Defendant Princess Ann Ricker Campbell, a legitimate child, was appointed administratrix of the estate. Trial was to a jury which found that the Plaintiff was Prince's child but that her mother was never validly married to Prince. We will affirm the judgment of the trial court.

Prince Ricker and Alice Rosemary Lawson married in 1954. Two daughters were born of this marriage, Princess Ann and Rosemary Jane. Alice Rosemary left Prince Ricker in September, 1957. The Plaintiff's mother, Annabel Boutwell, claimed that she and Prince Ricker were ceremonially married in Juarez, Mexico, on November 24 or 27, 1957, but it was not until February 28, 1958, that a divorce dissolved Ricker's first marriage to Alice Rosemary. Four days before the Plaintiff's birth, Annabel Boutwell changed her last name to Ricker. The Plaintiff was born on November 1, 1958, and her mother then married Jerry Barker in February, 1959. He later adopted the Plaintiff. On October 20, 1958, Prince Ricker married Jeri Laverne, which marriage was dissolved by divorce in January, 1960. In April, 1960, Prince Ricker married Marilyn Watts and their marriage lasted until 1967. Three children were born of this marriage, they being Prince Jr., Brett and Mark.

Prince Ricker was a chronic alcoholic with associated mental problems and was judicially declared non compos mentis in July, 1968. He died intestate on December 22, 1976, and the Defendant was appointed administratrix of his estate.

The Plaintiff filed her application to determine heirship in February, 1979. The Plaintiff contended that she was the legitimate child of Prince Ricker and was entitled to inherit from his estate. She alleged that upon the removal of the preexisting impediment to the marriage of Prince Ricker and her mother, which was his divorce in February, 1958, from Alice Rosemary, the relationship between Prince and the Plaintiff's mother became a putative or common-law marriage.

The Defendant contends that any relationship between the Plaintiff's mother and Prince was merely meretricious, being no marriage at all, and any relationship they may have had did not ripen into a putative or common-law relationship when Prince Ricker and Alice Rosemary Lawson divorced. The Defendant and the four other children of Ricker's valid marriages claimed to be Ricker's only heirs at law.

By their answers to the Special Issues submitted, the jury determined:

1. The Plaintiff was a child of Prince Ricker.
2. Ricker and Boutwell did enter into a ceremonial marriage on November 24 or 27, 1957.



3. On November 24 or 27, 1957, Ricker and Boutwell did agree to be husband and wife.
4. The jury failed to find that Boutwell and Ricker did live together as husband and wife on or after the 24th or 27th of November, 1957 until June, 1958.
5. The jury failed to find that Boutwell and Ricker did hold themselves out to the public as husband and wife until June, 1958.
6. This issue asked if on November 24 or 27, 1957, Boutwell believed Ricker to be unmarried, and the jury answered "She Believed He Was Married."

As previously stated, the trial court received the jury's verdict and based thereon entered a take-nothing judgment against the Plaintiff.

Recent developments in the inheritance rights of illegitimate children have been well documented in cases pertinent to this appeal such as *Batchelor v. Batchelor*, 634 S.W.2d 71 (Tex.App.—Fort Worth 1982, writ ref'd n.r.e.); *Johnson v. Mariscal*, 620 S.W.2d 905 (Tex.Civ.App.—Corpus Christi 1981), writ ref'd n.r.e., 626 S.W.2d 737,



(Tex.1982), *cert denied*, 458 U.S. 1112, 73 L.Ed.2d 1375, 102 S.Ct. 3496 (1982); *Winn v. Lackey*, 618 S.W.2d 910 (Tex.Civ.App.—Eastland 1981, no writ) and *Bell v. Hinkle*, 607 S.W.2d 936 (Tex.Civ.App.—Houston [14th Dist.] 1980), *cert denied*, 454 U.S. 826, 70 L.Ed.2d 100, 102 S.Ct. 115 (1981). In 1955, and again in 1977, the Texas Legislature provided that while illegitimate children could inherit from their mothers under the laws of descent and distribution, they had no right to inherit from their father. That situation changed, however, with the passage by the Legislature in 1979 of Section 42(b) of the Texas Probate Code, effective August 27, 1979. An illegitimate child can now inherit from his father under three circumstances:

1. If he is born or conceived before or during the marriage of his father and mother;
2. If he is legitimized by court decree as provided in Chapter 13 of the Family Code; or
3. If the father has executed a statement of paternity as provided in Section 13.22 of the Family Code or a like statement properly executed in another jurisdiction.

Chapter 13 of the Family Code provides

for a regular procedure through which a child may obtain a decree designating the alleged father as the father of the child in order to create a parent-child relationship. This may be an involuntary procedure pursuant to Sections 13.01 through 13.09, or it may be a voluntary legitimation pursuant to Section 13.21. If neither of these procedures is followed, a child may still be legitimated for the purposes of inheritance if the father has executed a written statement of paternity pursuant to Section 13.22 of the Family Code.

[1] The Plaintiff's first point argues that the Plaintiff was entitled to inherit from her father since the evidence conclusively established as a matter of law that the father recognized her as his child. To the extent that this point presents the argument that the evidence conclusively established that the father recognized the Plaintiff as his child, it will be overruled since the evidence was hotly contested on this issue. The instances of recognition by the father of the child are opposed in the main by the strong evidence of the deteriorated mental condition of the father during each occurrence as well as positive occurrences of nonrecognition. Considering only the evidence and the inferences arising therefrom that support the implied

finding of the court on nonrecognition, the argument is overruled.

[2] Since the evidence on recognition was disputed, the argument fails for the additional reason that the Plaintiff secured no finding on recognition. The issue was not requested. The matter has been waived. Rule 279, Tex.R.Civ.P.

[3] Finally and regardless of the above, the Plaintiff still would not inherit as a "recognized" illegitimate child since Section 42(b) of the Probate Code provides the only methods by which an illegitimate child may inherit from her father. Being a "recognized" illegitimate is not one of them. *Bell v. Hinkle, supra; Batchelor v. Batchelor, supra; Mills v. Edwards*, 665 S.W.2d 153 (Tex.App.—Houston [1st Dist.] 1984, no writ). *Johnson v. Meriscal, supra*, held to the contrary, but the Supreme Court at 626 S.W.2d 737, expressed no opinion on that ruling and refused both applications for writ of error.

*Mills v. Edwards, supra*, is the last case to have passed on the "recognition" ground and it too held that Section 42(b) provides the only methods by which an illegitimate child may inherit from her father. Being a "recognized" illegitimate is not one of them. The first point is overruled.

[4] The second point advances the same complaint as the first point except that it is in terms of great weight and preponderance of the evidence terminology. The point is overruled.

[5] The third point is that the Plaintiff is entitled to inherit since to provide otherwise would be unconstitutional under the Equal Protection clauses of the State and Federal Constitutions. Under the rule of *Winn v. Lackey, supra*, and the out-of-state cases cited therein, the equal protection argument fails as *Trimble v. Gordon*, 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977), has not been applied retroactively where the father died before the case came down and suit was filed afterwards. Even if the Plaintiff could claim under Section 42(b) as amended, her exclusion from the inheritance under that statute does not deny her constitutional equal protection since a rational state basis supports that legislation. *Davis v. Jones*, 626 S.W.2d 303 (Tex.1982); *Mills v. Edwards, supra*. The point is overruled.

[6] A series of as a matter of law and great weight and preponderance of the evidence points attack the jury findings to Special Issue Nos. Four, Five and Six. In

reviewing the record on the "as a matter of law" points, this Court must consider only the evidence and reasonable inferences arising therefrom which support the jury findings and must disregard all the evidence and inferences to the contrary. *Estate of Claveria v. Claveria*, 615 S.W.2d 164 (Tex.1981).

In regard to the claim of a good faith marriage by Annabel Boutwell, she admitted that as late as the summer of 1957, she knew of the common knowledge in the community where she lived that Prince Ricker was still married to Rosemary Lawson and as late as October, 1957, she did not know whether or not his divorce was final. She took no action to find out although the courthouse where the divorce had been filed was only two blocks from where she lived.

Annabel Boutwell testifies she and Ricker were ceremoniously married in Juarez, but she did not know any of the witnesses present and claims she lost the marriage certificate evidencing the alleged marriage. Defendant's Exhibit No. 31, consisting of two certificates of non-existence of records from Mexico, showed that the civil registries showed no marriage of Prince Ricker



and Annabel Boutwell from January, 1957, to December, 1959, in the Mexican registries. Further, witness Trejo, an attorney from Juarez, Mexico, testified that Mexican law requires all marriage ceremonies to be performed by the civil registry judge and that all such ceremonies be recorded in the civil registry of the district. Further, Annabel Boutwell testified that from the time of the purported marriage until she and Prince Ricker ended their relationship in June, 1958, she continued to live with her mother in Big Springs and Ricker kept his residence in Stanton, Texas, where he was teaching school.

No documentary evidence was introduced to substantiate the claims that they held themselves out to the public as husband and wife, although Annabel testified that they made several trips to Austin, San Antonio, San Angelo and Midland and registered at the hotels as Mr. and Mrs. Prince Ricker. She admitted that she never filed a petition for divorce from him, and a teaching associate of Ricker's testified that a search of the school records did not reflect whether Ricker was or was not married. He testified that he was under the impression that Ricker was single because he never mentioned a family. Annabel

Boutwell never filed suit for child support nor did she ever attempt to establish the paternity of Prince Ricker during his lifetime.

Ricker told his last wife Marilyn Watts in the presence of his father that he never married Annabel Boutwell.

[7] Thelma Barham, the mother of Rosemary Lawson Ricker, testified that she lived in Big Springs where Annabel Boutwell lived and she had at no time heard of any claim made by Annabel Boutwell that she was the wife of Prince Ricker. The "as a matter of law" points are overruled.

In reviewing the great weight and preponderance of the evidence points, we have considered all of the evidence. While the Plaintiff introduced evidence sufficient to support her contentions in regard to the challenged jury findings, we are of the opinion that the great weight and preponderance of the evidence points should likewise be overruled.

Based on the above, we therefore overrule Points of Error Nos. Four, Five, Seven, Eight, Nine, Ten, Eleven, Twelve and Thirteen.

[8] The final point to be considered is Point of Error No. Six which complains of the action of the trial court in excluding certain testimony offered by Annabel Boutwell that she had been told by Prince Ricker and by his first wife Alice Rosemary Lawson that Ricker was single at the time of the Juarez marriage. At the time that the offer was made as to a statement made by Alice Rosemary Lawson, the trial court first sustained the Defendant's objection and then overruled the Defendant's objection, and no further testimony was offered by the Plaintiff as to what the first wife had told her. At a later point, Annabel Boutwell began to testify as to what Ricker may have told her about his marriage status and the trial court then sustained the Defendant's objections stating that he had previously sustained the Defendant's objection as to what the first wife had told her and that he would sustain the Defendant's same objection as to what Ricker told her of his marriage relationship. Regardless of this testimonial confusion regarding the two offers of testimony, no bill of exceptions on the excluded testimony was tendered by the Plaintiff on what either of the two people told Annabel Boutwell. The



A.14

Plaintiff has failed to preserve any error.  
The point is overruled.

We have examined all of the Plaintiff's  
points and they are all overruled. The  
judgment of the trial court is affirmed.

A.15

NO. 2567

DELYNDA ANN RICKER	\$	IN THE DISTRICT
	\$	
BARKER REED	\$	COURT OF REAGAN
	\$	
VS.	\$	COUNTY, TEXAS
	\$	
PRINCESS ANN	\$	
	\$	
RICKER CAMPBELL,	\$	
	\$	
INDIVIDUALLY AND	\$	
	\$	
AS ADMINISTRATRIX	\$	
	\$	
OF THE ESTATE OF	\$	83RD JUDICIAL
	\$	
PRINCE RICKER,	\$	DISTRICT
	\$	
DECEASED	\$	

JUDGMENT

ON THE 13th day of September, 1982, came on to be heard and considered by the Court the above entitled and numbered cause, and came the Plaintiff in person and by her Attorney, and came the Defendant in person and by its Attorney,

and all parties announced ready for trial, whereupon a Jury of twelve good and lawful jurors was selected and said Jury having been duly empaneled and sworn, the case proceeded to trial and the Jury heard the evidence. The Charge of the Court and the argument of counsel and said case was then submitted to the Jury upon the Special Issues contained in the Court's Charge, to which reference is here made for all purposes; whereupon, the Jury retired on the 17th day of September, 1982, to consider its verdict and to make its findings of fact upon the Special Issues, Definitions and Explanatory Instructions submitted to the Jury by the Court and the Court's Charge and afterwards, to-wit:

On the 17th day of September, 1982, the Jury returned into Open Court

A.17

its verdict consisting of the following  
Answers to the Special Issues submitted  
to it:

SPECIAL ISSUE NO. 1

"Yes"

SPECIAL ISSUE NO. 2

"Yes"

SPECIAL ISSUE NO. 3

"Yes"

SPECIAL ISSUE NO. 4

"No"

SPECIAL ISSUE NO. 5

"No"

SPECIAL ISSUE NO. 6

"She believed he was married"

The findings and verdict of the  
Jury were received by the Court without  
objection from any of the parties and  
were filed and entered of record in the  
Minutes of the Court, and the Jury was

discharged.

WHEREUPON, the Defendant having made, and the Court having duly considered, the Motion for Judgment, the Court is of the opinion that judgment should be entered for the Defendant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff take nothing by her suit and that the Defendant be discharged and dismissed with its costs.

All relief not granted herein, is hereby denied.

SIGNED this 1st day of  
November, 1982.

HONORABLE WILLIAM H. EARNEY,  
JUDGE PRESIDING

A.19

FILE: November 1, 1982

---

Hazel Carr

District Clerk, Reagan Co., Texas

A.20

SUPREME COURT OF TEXAS

P.O. Box 12248

Supreme Court Building

Austin, Texas 78711

Mary M. Wakefield, Clerk

June 5, 1985

Mr. R. Stephen McNally

P.O. Box 1586

Austin, TX 78767

Mr. Paul McCollum

Shafer, Gilliland, Davis,

McCollum & Ashley

P.O. Drawer 1552

Odessa, TX 79760

RE: Case No. C-3851

STYLE: DELYNDA ANN RICKER BARKER REED

v. PRINCESS ANN RICKER CAMPBELL

ET AL

A.21

Dear Counsel:

Today, the Supreme Court of Texas  
refused the above referenced application  
for writ of error with the notation, No  
Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By \_\_\_\_\_ Deputy



A.22

SUPREME COURT OF TEXAS

P.O. Box 12248

Supreme Court Building

Austin, Texas 78711

Mary M. Wakefield, Clerk

June 5, 1985

Mr. R. Stephen McNally

P.O. Box 1586

Austin, TX 78767

Mr. Paul McCollum

Shafer, Gilliland, Davis,

McCollum & Ashley

P.O. Drawer 1552

Odessa, TX 79760

RE: Case No. C-3851

STYLE: DELYNDA ANN RICKER BARKER REED

v. PRINCESS ANN RICKER CAMPBELL

ET AL

A.23

Dear Counsel:

Today, the Supreme Court of Texas granted petitioner's motion to amend motion for rehearing of the application for writ of error in the above styled case. It is further ordered that the amended motion for rehearing is overruled.

Respectfully yours,

Mary M. Wakefield, Clerk

By \_\_\_\_\_ Deputy

COURT OF APPEALS  
EIGHTH SUPREME JUDICIAL DISTRICT  
EL PASO, TEXAS

DELYNDA ANN	\$	
	\$	
RICKER BARKER	\$	
	\$	
REED,	\$	
	\$	
Appellant,	\$	
	\$	
VS.	\$	No. 08-83-00022-CV
	\$	
PRINCESS ANN	\$	Appeal from 83rd
	\$	
RICKER CAMPBELL,	\$	
	\$	
INDIVIDUALLY AND	\$	District Court of
	\$	
AS ADMINISTRA-	\$	
	\$	
TRIX OF THE	\$	Reagan County,
	\$	
ESTATE OF	\$	
	\$	
PRINCE RICKER,	\$	Texas. (TC# 2567)
	\$	
DECEASED	\$	
	\$	
Appellee.	\$	

J U D G M E N T

This cause came on to be heard

on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellee do have and recover of and from the appellant and her sureties all costs in this behalf expended, and that this decision be certified below for observance.

December 19, 1984

Before Panel No. 1

Ward, Osborn and Schulte, JJ.

A.26

Court of Appeals  
Eighth Supreme Judicial District  
of Texas

El Paso City-County Building

El Paso, Texas 79901-2490

Martha (Fran) S. Diaz, Clerk

(915) 546-2240

January 23, 1985

R. Stephen McNally

712-A East 26th Street

Austin, TX 78705

Paul McCollum

Shafer, Gilliland, Davis,

McCollum & Ashley

P.O. Drawer 1552

Odessa, TX 79760

A.27

Kathleen M. McCulloch  
Shafer, Gilliland, Davis,  
McCollum & Ashley  
P.O. Drawer 1552  
Odessa, TX 79760

RE: Case No. 08-83-00022-CV

STYLE: REED, DELYNDIA ANN RICKER BARKER

V: CAMPBELL, PRINCESS ANN RICKER

The Honorable Court of Appeals  
today rendered its order overruling  
Appellant's motion and amended motion for  
rehearing.

(NO OPINION)

Respectfully yours,

Martha (Fran) S. Diaz, Clerk

IN THE COURT OF APPEALS OF THE STATE  
OF TEXAS, EL PASO, EIGHTH SUPREME  
JUDICIAL DISTRICT

Delynda Ann Ricker

Barker REED,

Appellant,

VS

No. 08-83-00022-CV

Princess Ann Ricker

CAMPBELL, Individually

and as Administratrix

of the Estate of

Prince Ricker, -deceased, Appellee.

NOTICE OF APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Delynda Ann Ricker Barker Reed, the appellant above named, hereby appeals to the Supreme Court of the United States from the judgement of the Court of Appeals of Texas, El Paso, affirming the judgement

of the trial court, entered in this case on December 19, 1984. State appeals of said judgment were exhausted on July 17, 1985, when the Texas Supreme Court refused rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

---

R. Stephen McNally

Attorney for Delynda Ann Ricker

Barker Reed, Appellant

P.O. Box 1586

Austin, Texas 78767

(512) 474-1397

Filed in Court of Appeals

Sep 30, 1985

Martha S. Diaz

Clerk, Eighth District



No. 08-83-00022-CV

---

Delynda Ann Ricker Barker

REED, Appellant,

VS.

Princess Ann Ricker CAMPBELL,  
Individually and as Administratrix  
of the Estate of Prince Ricker,  
deceased, Appellee.

---

PROOF OF SERVICE

---

I, R. Stephen McNally, counsel of record for Delynda Ann Ricker Barker Reed, and a member of the Bar of the Supreme Court of the United States, hereby swear and certify that, on the 27th day of September 1985, which date was within the time permitted for filing and service, I served three copies of the enclosed notice of appeal to the Supreme

Court of the United States on each of the several parties thereto, as listed below:

1. On Princess Ann Ricker Campbell, individually and as Administratrix of the Estate of Prince Ricker, deceased, by mailing three copies in duly addressed envelopes, with first class postage pre-paid, Return Receipt Requested, registered mail No. R-285-727-471 to her counsel of record in both capacities, as follows:

Paul McCullum and Kathleen M. McCulloch, Attorneys for Princess Ann Ricker Campbell; Shafer, Gilliland, Davis, McCullum and Ashley, P.O. Drawer 1552, Odessa, Texas 79760.

It is further certified that all parties required to be served have been served, and that the list of such parties

is as set forth above.

---

R. Stephen McNally

Attorney for Appellant/Petitioner.

Delynda Ann Ricker Barker Reed.

P.O. Box 1586,

Austin, Texas 78767

(512) 474-1397

Filed in Court of Appeals

Sep. 30, 1985

Martha S. Diaz

Clerk, Eighth District

**APPENDIX B**  
**CONSTITUTIONAL AND STATUTORY**  
**PROVISIONS INVOLVED**

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APPENDIX A  
CHRONOLOGY OF EVENTS

1. Sept. 27, 1954

Prince Ricker & Alice Rosemary Lawson are married, two children are born being:

- (1) Princess Ann
- (2) Rosemary Jane

2. Nov. 24 or 27, 1957

Claimed Mexican marriage of Prince Ricker & Annabel Boutwell.

3. Feb. 28, 1958

Divorce - Prince Ricker & Alice Rosemary Lawson.

4. June or Aug., 1958

Claimed end of relationship between Prince Ricker and Annabel Boutwell.

5. Oct. 20, 1958

Marriage of Prince Ricker and Jeri Laverne.

6. Oct. 27, 1958

Annabel Boutwell changes her name to "Ricker".

7. Nov. 1, 1958

Appellant is born.

8. Feb. 24, 1959

Marriage of Annabel Boutwell &  
Jerry Oran Barker.

9. Jan. 4, 1960

Divorce - Prince Ricker & Jeri  
Laverne.

10. April 8, 1960

Marriage of Prince Ricker and  
Marilyn Watts, three children  
are born being:

- (1) Prince, Jr.
- (2) Brett
- (3) Mark

11. Oct. 21, 1966

Appellant adopted by Jerry Oran  
Barker.

12. March 8, 1967

Divorce - Prince Ricker & Mari-  
lyn Watts.

13. Dec. 22, 1976

Prince Ricker dies intestate.



14. Jan. 3, 1977

Letters of Administration  
granted to Appellee.

15. April 26, 1977

Trimble v. Gordon decided.

16. Feb. 16, 1978

Appellant files Notice of Heir-  
ship and claim for \$21,600.00  
for past child support.

17. June 15, 1978

Appellant filed independent  
suit in the 183rd Judicial Dis-  
trict Court of Reagan County,  
Texas for child support.

18. Feb. 27, 1979

Appellant filed in the probate  
proceedings an Application to  
Determine Heirship claiming she  
was a legitimate child and en-  
titled to one-sixth (1/6) of  
the estate.

19. April 20, 1981

All actions consolidated and  
transferred to the 183rd Judi-  
cial District Court.

20. Sept. 13, 1982

Appellant non-suits her claim  
for child support.

21. Sept. 14, 1982

Trial commences.

NO. 85,755

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DELYNDA ANN RICKER BARKER REED,  
APPELLANT,

V.

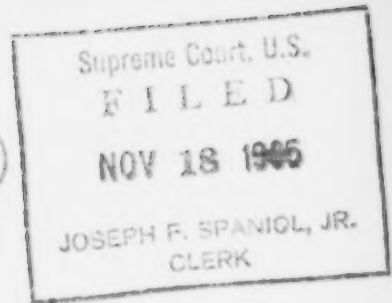
PRINCESS ANN RICKER CAMPBELL,  
INDIVIDUALLY, AND AS ADMINISTRATRIX  
OF THE ESTATE OF PRINCE RUPERT RICKER,  
DECEASED,  
APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS FOR THE  
EIGHTH SUPREME JUDICIAL DISTRICT OF THE  
STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

PAUL McCOLLUM  
Counsel of Record for Appellee  
with  
Kathleen M. McCulloch  
on the brief  
of  
SHAFFER, GILLILAND, DAVIS,  
McCOLLUM & ASHLEY, INC.  
P.O. Drawer 1552  
Odessa, Texas 79760  
(915) 332-0893

60



## QUESTIONS PRESENTED

- I. WHETHER THE BASIS FOR DECISION AP-  
PELLEE CONSTITUTES INDEPENDENT AND  
ADEQUATE STATE GROUNDS?
- II. WHETHER APPELLANT PRESENTS A SUB-  
STANTIAL FEDERAL QUESTION FOR RE-  
VIEW?

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NO. 85-755

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

DELYNDA ANN RICKER BARKER REED,  
APPELLANT,

V.

PRINCESS ANN RICKER CAMPBELL,  
INDIVIDUALLY, AND AS ADMINISTRATRIX  
OF THE ESTATE OF PRINCE RUPERT RICKER,  
DECEASED,  
APPELLEE.

---

ON APPEAL FROM THE COURT OF APPEALS FOR THE  
EIGHTH SUPREME JUDICIAL DISTRICT OF THE  
STATE OF TEXAS

---

MOTION TO DISMISS OR AFFIRM

---

TO THE HONORABLE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

Appellee moves the Court to dismiss  
the appeal herein because (1) Appellant's

petition does not manifest a substantial federal question, and (2) the lower Court's decision and Texas Supreme Court's review was based on adequate and independent state grounds; or in the alternative, to affirm the judgment of the Eighth Supreme Judicial District Court of the State of Texas.

#### JURISDICTION

Appellant seeks to invoke the jurisdiction of this court under the provisions of 28 U.S.C. 1257(2), or alternatively, as a petition for writ of certiorari pursuant to 28 U.S.C. 2103.

#### STATEMENT OF THE CASE

Appellant's petition arises from her claim to heirship as an illegitimate child of the Estate of Prince Rupert Ricker, Deceased, asserting entitlement to one-sixth (1/6) of the estate of Prince Ricker, Deceased. Appellant erroneously

believes it is one-seventh (1/7).

I. PLEADINGS AT TRIAL:

Prince Ricker died a judicially declared non compos mentis and intestate on December 22, 1976. Appellant was eighteen years of age. On January 3, 1977, Letters of Administration over the estate were granted to Appellee. Over one year later, on February 16, 1978, Appellant filed a Notice of Heirship and claim for \$21,600.00 in past child support. The claim for child support was nonsuited on the day of trial. On June 15, 1978, Appellant filed an independent suit in the 183rd Judicial District Court of Reagan County, Texas, on her claim for child support. And, on February 27, 1979, Appellant filed in the probate proceedings an Application to Determine Heirship, claiming she was a legitimate child of the decedent's estate. On April 20, 1981, all actions were consolidated

and transferred to the 183rd Judicial District Court of Reagan County, Texas for trial.

II. EVIDENCE AT TRIAL:

A hotly contested trial to a jury ensued. At trial, Appellant claimed to be the legitimate child of the deceased by virtue of a marriage on November 24 or 27, 1957 in Juarez Mexico between her mother, Annabel Boutwell, and the deceased Prince Ricker. The purported marriage was void because at the time of the alleged Mexican marriage, Prince Ricker was already lawfully married to Alice Rosemary Lawson. Appellant contended that upon the divorce of Prince Ricker and Alice Rosemary Lawson on February 28, 1958, a common law or putative marriage arose. Evidence at trial produced testimony from Annabel Boutwell that from the time of the purported Mexican marriage

until the end of their relationship, she continued to live with her mother in Big Spring, Texas, and Prince Ricker kept his residence at the Stanton Hotel in Stanton, Texas, where he taught school, and that they would occasionally "live" together on weekends as their work schedules allowed. Annabel Boutwell's maid testified that on some Fridays Prince Ricker would show up at the residence in Big Spring and on some Mondays mornings she would find his laundry. Prince Ricker kept several items such as a typewriter and school annuals at the house in Big Spring and kept some clothes and other personal belongings in Stanton, Texas. J. M. Yater, a teaching colleague of Prince Ricker during the school year 1957-1958, was under the impression Prince Ricker was single.

Prince Ricker told his last wife, Marilyn Watts, in the presence of his

father, that he never married Annabel Boutwell.

Thelma Barham, mother of Alice Rosemary Lawson, lived in Big Spring, Texas, in the late 1950's and 1960's, where she owned a hat shop. At no time did she hear in that small community of any claims by Annabel Boutwell to be the wife of Prince Ricker.

Prince Ricker's sister, Cinderette McDaniel, testified for Appellant that "I knew it was this woman he supposedly had lived with and that she had this daughter that she claimed was his". This is nothing more than hearsay and no evidence. Cindrette McDaniel also testified she had a close relationship with Prince Ricker and they frequently visited in each other's home during the time she lived in Big Spring, Texas from 1956 until 1967. Certainly she should not have

to rely on hearsay.

On October 20, 1958, Prince Ricker lawfully married another woman, Jeri Laverne.

On October 27, 1958, Annabel Boutwell had her name changed to Annabel "Ricker".

On November 1, 1958, Appellant was born. Although Prince Ricker was named as Appellant's father on her birth certificate, Reagan County Memorial Hospital's Director of Nurses, Rose McWilliams testified it is usually the mother that fills out the information in regard to the birth of the child other than the child's sex, weight and time of birth, and that a mother could even put down that Richard Nixon was the father of the child, and the hospital would have no way of ascertaining the facts. She further testified that the fathers are usually not even present when the mothers fill

out the form, that the "informant" is the provider of information and signs his or her name to the birth certificate, and that Annabel Boutwell "Ricker" was the informant. This was no evidence Prince Ricker acquiesced or even had knowledge of her actions.

Annabel Boutwell testified she never attempted to obtain a divorce from Prince Ricker, although she admitted knowing people need to obtain legal documents to get a divorce, although she did go to Court four days before Appellant's birth to change her name to Ricker.

On February 24, 1959, just over three months after Petitioner's birth, Annabel Boutwell married Jerry Barker, who adopted Appellant in 1965.

Appellant relied on the testimony of Armando Mata Martel as evidence supporting Prince Ricker's recognition of Appel-



lant as his child when he allegedly relied on Martel's advice to allow Jerry Barker to adopt Appellant in 1966. However, Martel testified he did not even meet Prince Ricker until 1966 or 1967. Appellant had already been adopted by Jerry Barker, and Prince Ricker was still living with his last wife, Marilyn Watts.

Prince Ricker, Deceased, suffered and died from chronic alcoholism. In 1968, Prince Ricker was judicially declared non compos mentis and the guardianship over his person and estate continued through his death. Prior to the time Prince Ricker was admitted to Hazelden Clinic in 1976, five months prior to this death, 315 pages of medical records from eight different hospitals and mental institutions were admitted into evidence, evidencing Prince Ricker's irreversible alcoholism, dementia, delusions, confabulations, Korsakoff's psychoses, memory

delusions, hallucinations, psychotic reactions and peripheral neuropathy due to degeneration and atrophy of the brain cells as a result of seizures and toxic effects of alcohol.

As to Appellant's assertion in her Jurisdictional Statement (p.7 footnote) that Prince Ricker "admitted only that he could have been Delynda's father", Appellee says that the evidence was that five months prior to his death, Prince Ricker was discharged from Hazelden Clinic and flown by his sister and her husband, Cindrete and Reginald McDaniel, to their home in Dallas, Texas, where he stayed a few days before returning to his permanent abode at the La Posta Motor Lodge in El Paso, Texas. In the rehabilitative book furnished by Hazelden Clinic, Prince Ricker wrote "Number 2, I was the father, reasonably sure, of a daughter out of

wedlock. I justified it in the usual manner. She put it in the newspaper. I was conning Dad. There was an easier way." Cindrette McDaniel then said "You mean Annabel". Reginald McDaniel testified of the conversation "my wife was running the conversation". At the time of the alleged conversation five months before Prince Ricker's death, Reginald McDaniel testified Prince Ricker would peek into the booklet and then hide it, which is a part of Korsakoff's syndrome, and these actions did not surprise Dr. McDaniel. Further, as early as 1965, Prince Ricker's eyesight had deteriorated to a point he could not even read without using a magnifying glass.

After the death of Prince Ricker, his sister, Cindrette McDaniel, filed a Sworn Affidavit of Heirship in the Deed Records of Reagan County, Texas stating Prince Ricker had been married three

times during his life; to Rosemary Lawson, of which two children were born being Princess Ann Ricker and Rosemary Jane Ricker; to Jeri Laverne; and, the Marilyn Salt (Watts) of which three children were born, being Prince Ricker, Jr., Brett Drayton Ricker and Mark Ricker. The affidavit also states Prince Ricker had no deceased children and had "never adopted any children or cared for any children . . . other than the natural children named above."

In contradiction to Annabel Boutwell's testimony that she last saw Prince Ricker in 1968 or 1967 when he got out of the Big Spring State Hospital, and who had seen him only once prior to that time in 1959 or 1960, Herb Gehring, the manager of the La Posta Motor Lodge in El Paso, Texas, testified Annabel Boutwell and Appellant visited Prince Ricker in

the Spring of 1976 and stayed two or three days. After their first visit, Gehring noticed Appellant and her mother left a small photograph of Appellant stuck in the mirror of Prince Ricker's room. He also testified that during this time Prince Ricker was delusional and unable to care for himself.

A chronology of pertinent dates is set forth in Appendix A herein.

### III. JURY FINDINGS:

The jury, in answer to special issues, found by a preponderance of the evidence that (1) Appellant was the child of Prince Ricker, Deceased; (2) that the deceased and Annabel Boutwell, Appellant's mother, entered into a ceremonial marriage on November 24 or 27, 1957; (3) that on November 24 or 27, 1957, the deceased and Annabel Boutwell agreed to be husband and wife; (4) that the deceased and Annabel Boutwell did not live toge-

ther as husband and wife on or after November 24 or 27, 1957 until June 1958; (5) that the deceased and Annabel Boutwell did not hold themselves out to the public as husband and wife until June 1958; and (6) that asked whether on November 24 or 27, 1957, Annabel Boutwell believed the deceased to be unmarried, the jury answered "she believed he was married".

IV. HOLDINGS OF THE COURTS BELOW:

The Trial Court properly held Appellant to be illegitimate and incapable of inheriting from the intestate estate of Prince Ricker, Deceased.

From the Judgment of the Trial Court, Appellant perfected appeal to the Court of Appeals for the Eighth Supreme Judicial District of Texas. That Court correctly affirmed the judgment of the Trial Court in holding that the purported

1957 Mexican marriage between Appellant's mother, Annabel Boutwell, and Prince Ricker, which was void since Prince Ricker was still validly married to his first wife, Alice Rosemary Lawson, did not thereafter ripen into a common law or putative marriage after the divorce of Prince Ricker, Deceased and Alice Rosemary Lawson on February 28, 1958, because the jury's answers, supported by sufficient evidence, failed to find the elements of either a common law or putative marriage.

The Court of Appeals further correctly held that Appellant was not entitled to inherit from the Estate of Prince Ricker as a "recognized" illegitimate since there were positive occurrences of nonrecognition, the Appellant failed to request an issue on recognition, and that Section 42(b) of the Texas Probate Code provides the only methods of



which an illegitimate child can inherit from her father.

The Court of Appeals went on to hold that no denial of equal protection under the State and Federal Constitutions was wrought on Appellant and under the rule of Winn v. Lackey, 618 S.W.2d 910 (Tex.--Civ.App.--Eastland 1981, no writ), the equal protection argument of Appellant failed because Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977) has not been applied retroactively, and even if Appellant could claim under the existing amended version of Section 42(b), her exclusion under that statute does not deny her equal protection, as a rational state basis supports that legislation.

Rehearing by the Court of Appeals was denied without opinion on January 23, 1985.



The Texas Supreme Court refused discretionary review with the notation "no reversible error" on June 5, 1985, and overruled Petitioner - Appellant's Amended Motion for Rehearing of her Application for Writ of Error on July 17, 1985.

## ARGUMENT AND AUTHORITIES

Appellant seeks to convince the Court that at the time Prince Ricker died on December 22, 1976, insufficient statutory and constitutional opportunity was afforded Appellant in which to establish herself as a "legitimated" child and make herself capable of inheriting from the Estate of Prince Ricker, Deceased. Appellee believes sufficient non-federal bases exist for dismissal of Appellant's appeal or denial of her petition.

Appellee would show to the Court that the 1955 version of Section 42 of the Texas Probate Code, V.A.C.S. has been amended twice since the death of Price Ricker, in 1977 and 1979. As to which version Appellant is requesting this Court to hold unconstitutional is questioned by Appellee herein. For Appellant to ask this honorable Court to strike

down the 1955 and 1977 versions of Section 42 of the Texas Probate Code would invade the long established doctrine of mootness. A reading of Appellant's jurisdictional Statement makes it hard to determine which versions of Section 42 Appellant is claiming to be unconstitutional. Apparently, Section 37 and the pre-1979 versions of Section 42 of the Texas Probate Code are under attack, as Appellant claims entitlement "to any relief which she would have been entitled to if the current Section 42 had been in effect when her father died". (Jurisdictional Statement, p. 47) Appellee states that, as properly held by the honorable Texas Court of Appeals in this case,

"Even if Plaintiff (Appellant) could claim under Section 42(b) as amended, her exclusion from the inheritance under that statute does not deny her constitutional equal protection since a rational

state basis supports that  
legislation. Davis v.  
Jones, 626 S.W.2d 303  
(Tex. 1982); Mills v. Ed-  
wards, supra."

Reed v. Campbell, 682 S.W.2d 697 (Tex.-  
Civ.App.--El Paso 1984, ref'd, n.r.e.)  
When Prince Ricker died intestate on De-  
cember 22, 1976, Section 42 of the Texas  
Probate Code stated as follows:

"For the purpose of in-  
heritance to, through and  
from an illegitimate  
child, such child shall  
be treated the same as if  
he were the legitimate  
child of his mother, so  
that he and his issue  
shall inherit from his  
mother and from his ma-  
ternal kindred, both de-  
scendants, ascendants and  
collaterals in all de-  
grees, and they may inhe-  
rit from him. Such child  
shall also be treated the  
same as if he were a le-  
gitimate child of his  
mother for the purpose of  
determining homestead  
rights, the distribution  
of exempt property, and  
the making of any family  
allowances. Where a man,  
having by a woman a child  
or children shall after-  
wards intermarry with

such a woman, such child or children shall thereby be legitimated and made capable of inheriting his estate. The issue of marriages deemed null in law shall nevertheless be legitimate."

Winn v. Lackey, 618 S.W.2d 910 (Tex.Civ.--App.--Eastland 1981, no writ)

On April 26, 1977, this Court decided the case of Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977). The decision was five to four. At question was the constitutionality of an Illinois Probate Act statute which distinguished between legitimate and illegitimate children, under which illegitimate children were allowed to inherit only from their mothers by intestate succession, while legitimates were allowed to inherit not only from their mothers by intestate succession, but also were allowed to inherit from both their mothers and fathers. The Illinois statute re-

quired marriage and formal acknowledgment by the father, whereas the Texas statute required only marriage. This Court held the Illinois statute violated the equal protection clause of the Fourteenth Amendment to the United States Constitution because such discrimination did not bear a reasonable relation to legitimate legislative aims.

In 1971 in Texas, the constitutionality of Sections 3(b) and 42 of the Texas Probate Code were examined in Wells v. Hanes, 464 S.W.2d 393 (Tex.Civ.App.--Hou.[14th Dist.] 1971, ref'd, n.r.e. That Texas Court of Civil Appeals held Appellants were unable to show themselves entitled to inherit from the deceased because they had not shown their mother and purported father had ever been married and that the above statutes were "rational and valid and that the classification involved is both rational and rea-

sonable".

In 1978, the Tyler Court of Civil Appeals examined the constitutionality of Section 42 of the Texas Probate Code prior to its 1977 and 1979 amendments in Lovejoy v. Lillie, 569 S.W.2d 501 (Tex.-Civ.App.--Tyler 1978, ref'd, n.r.e.), and held Section 42, as it existed prior to the 1977 and 1979 amendments, was unconstitutional because it did not bear a reasonable relation to legitimate legislative aims, to the extent it conflicted with the recent decision in Trimble v. Gordon, supra.

However, neither the Trimble case, supra, nor the Lovejoy case, supra, determined whether or not Trimble would be applied retroactively.

The precise question of whether or not Trimble v. Gordon, supra, would be applied retroactively was decided by the

Eastland Court of Civil Appeals in the case of Winn v. Lackey, supra, which this Appellee states is dispositive of the case at bar as a matter of law, as was found by the Court of Appeals' opinion in the case at bar.

In Winn v. Lackey, supra, Virgil Winn died intestate and unmarried on April 6, 1973. On January 26, 1978, Wilder Winn, Individually and as Guardian of the Estate of his incompetent brother brought suit against his two surviving brothers seeking a partition of certain lands in Stonewall County, Texas, which the brothers had inherited from their mother. In the petition, Wilder Winn alleged that his predeceased brother, Virgil, died intestate on April 6, 1973, was unmarried at the time of his death, and had no children.

Thereafter, on May 9, 1978, after the decision in Trimble, supra, an inter-



vention was filed in the suit by the Guardian of the Estate of Julie Marie York, a minor born July 12, 1969, alleging that this child was the sole surviving heir at law of Virgil Winn and claiming an interest in the lands in question.

The Trial Court held that this minor child owned a thirty percent interest in and to said lands. The Winn brothers appealed. On appeal, the Court of Civil Appeals reversed and rendered that portion of the judgment awarding the minor illegitimate child an interest in the lands and held the Winn brothers were the owners of one hundred percent of the lands.

The issue facing the Court in Winn, as in the case at bar, is whether the rule announced in Trimble v. Gordon, supra, should be applied retroactively to

the extent that an illegitimate child, who filed suit after Trimble, could inherit from her father who died intestate prior to Trimble.

Appellee urges that Winn v. Lackey, supra, is in point with the issue at bar. In Winn, Virgil Winn died intestate on April 6, 1973, prior to Trimble, as in the case at bar. Suit was not filed in Winn until after Trimble, supra, was decided, as in the case at bar.

The Court in Winn reviewed the cases of other jurisdictions confronted with the question of whether or not Trimble, supra, should be applied retroactively, as was being urged by the Guardian of the illegitimate child. Further, the Court stated:

"The Supreme Court in Trimble did not discuss the issue of whether the decision should be given retroactive or prospective application. We therefore may determine the proper

application of the rule.  
10 A.L.R.3d 1371, Sec.5 at  
1389-1392, Sec.8 at 1397-  
1412."

The Court held that where the intestate father died before Trimble, but the illegitimate child's suit was not filed until after April 26, 1977, the day Trimble was decided, then Trimble would not be applied retroactively, one of the reasons being to do so would cause chaotic title conditions.

Petitioner in this case is attempting to establish herself as an heir at law to the Estate of Prince Ricker, which is comprised primarily of interests in real property. Winn also dealt with a purported illegitimate child's interest in real property, and the orderly administration of the estate. Winn is in point with the case at bar, and under the authority of Winn, the Trimble case should not be applied retroactively, as held by

the honorable Court of Appeals in this case.

In upholding the constitutionality of the 1977 amendments to Section 42 of the Texas Probate Code, the Texas Supreme Court discussed in detail the U.S. Supreme Court cases concerning the constitutionality of several state probate statutes dealing with inheritance rights of illegitimate children in Davis v. Jones, 626 S.W.2d 303 (Tex. 1982). The Davis opinion notes that the U.S. Supreme Court was sharply divided five to four, with many opinions in each case, and that the "facts of the three Supreme Court cases appeared to play a major role in the decisions".

In Labine v. Vincent, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017 (1971), this Court, five to four, upheld the constitutionality of a Louisiana statute which provided that "illegitimate child-

ren, though duly acknowledged, cannot claim the rights of the legitimate child", under facts where the intestate father and mother of the child had appeared before a state agency and the father formally acknowledged the child as his. This Court found a rational and important state interest in upholding the statute's constitutionality.

The next case that dealt with the question was Trimble v. Gordon (1977), supra, which was also decided five to four. The Texas Supreme Court noted that "the Illinois statute authorized inheritance if the parents married and [not or] the father acknowledged that the child was his," and an Illinois court had previously entered a paternity order requiring the father pay child support for his illegitimate daughter. This Court held that the Illinois statute requiring mar-

riage and acknowledgement created an "insurmountable" barrier and there was no rational basis for the statute, constituting invidious discrimination and violation of the equal protection clause.

The next case to come before this Court and discussed by the Texas Supreme Court in Davis v. Jones, supra, was Lalli v. Lalli, 439 U.S. 259, 58 L.Ed.2d 503, 99 S.Ct. 518 (1978). This was also decided five to four. At question was the constitutionality of a New York statute which required, in the absence of a marriage, a court order of paternity in a proceeding begun during the mother's pregnancy or within two years after the child's birth. In this case, there was no marriage, no will and no paternity order, although the father did execute a formal consent to marriage for the child, referring to the child as "my son". However, this Court held that the formally

executed consent to marry did not constitute a formal acknowledgment of the child, and distinguished Trimble because Illinois required both formal recognition and marriage. This Court upheld the constitutionality of the New York statute, and held that the statute's evidentiary requirement of having paternity judicially declared before the father's death was directed to the State's primary goal of providing for the just and orderly disposition of property on death and exposure to spurious claims even though the statute might be unfair to some illegitimates who would otherwise be able to establish their relationship without disruption of the administration of estates.

In the case at bar, Section 42 of the Texas Probate Code, prior to the 1977 and 1979 amendments, only required a marriage of the father and the mother, and



did not require a formal recognition. It was less stringent than the statute confronted by the Court in Trimble, supra, and the case at bar should be governed by the reasoning in the Lalli case, supra, rather than Trimble, supra. Further, Trimble should not be applied retroactively as was held in Winn, supra, and Appellant should not be entitled to inherit from the Estate of Prince Ricker.

Further, this suit was brought by Appellant following the enactment of the 1977 amendment to Section 42 of the Texas Probate Code. The Texas Supreme Court in Davis v. Jones, supra, dealt with a complex situation as to whether an illegitimate daughter, Kathryn Jones, and an illegitimate grandson, Craig Faultry, "in the absence of a will", could inherit from the father and the grandfather respectively. Both were trying to inherit from the estate of Warren Davis, Sr.



(father-grandfather) who died in 1978. Kathryn Jones claimed to be the illegitimate daughter of Warren Sr. by a woman never married to Warren Sr., Ruth Lockett. Craig Faultry claimed to be the illegitimate son of Warren Jr. and the grandson of Warren Sr. and his lawful wife, Marie Davis. Warren Jr. never married and died in 1960, one month prior to Craig Faultry's birth.

In connection with the claim of the grandson, Craig Faultry, the Texas Supreme Court said:

Craig Faultry goes through the step of legitimation by his father. His claim is against the estate of his grandfather. The mother of Craig Faultry is not identified in the record. The state has provided no method, other than adoption, for legitimating grandchildren, great grandchildren, or great great grandchildren. And, at the time of the death of his father in 1960, there were not

"suitable alternatives" under Trimble. This does not lead us, however, to declaring the 1977 Texas statute unconstitutional, - the statute in force when the suit was brought. [emphasis ours]

Thus, should Appellant be entitled to claim under Section 42(b) of the Texas Probate Code, pursuant to its amendments, this Supreme Court in Davis v. Jones, supra, refused to hold the 1977 statute unconstitutional and found a rational state interest to support the legislation.

The Texas Court of Appeals decision in Winn v. Lackey, supra, properly held that Trimble v. Gordon, supra, should not be applied retroactively. The State of Texas has a valid important primary goal of providing for the just and orderly disposition of property on death, safeguarding the dependability of real property titles passing under intestacy statutes and safeguarding against spurious

claims. This Court has recognized that "this is an area with which the states have an interest of considerable magnitude". Lalli v. Lalli, supra.

Regarding Petitioner's argument that because she was born prior to September 1, 1975, the effective date of Chapter 13 of the Texas Family Code, V.A.C.S., she had no remedy was precisely one of the Appellant's arguments in the case of Wynn v. Wynn, 587 S.W.2d 790 (Tex.Civ.App.--Corpus Christi 1979, no writ). The Court in Wynn, supra, said "This argument virtually ignores the United States Supreme Court decision of Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973) and every other involuntary paternity suit brought for establishing the paternity of children born prior to September 1, 1975, in Texas after that decision". The Wynn Court went onto hold, as was recognized by this Supreme Court,

that illegitimate children had a common law right to sue to establish paternity "as a necessary requisite to establish 'a judicially enforceable right' otherwise accorded to legitimate children generally". Gomez v. Perez, supra, as early as 1973 held that denial, under Texas law, of an illegitimate child's common law right to support from its natural father violated the equal protection clause of the Fourteenth Amendment.

Appellant further argues that she has not had a sufficient time or sufficient remedy in which to establish the paternity of Prince Ricker, since the versions of Section 13.01 of the Texas Family Code prior to 1983 never gave her sufficient time from birth to sue for paternity. In rebuttal, however, Appellee would state that Petitioner's suit against the Estate of Prince Ricker is

also barred by the general four year statute of limitations, Article 5529, V.A.C.S.

It has been held that the 1975 amendment to Chapter 13 of the Texas Family Code, Article 13.01 V.A.C.S., which stated that a suit to establish paternity must be brought before the child is one year old is not to be applied retroactively, and was also held unconstitutional in Mills v. Habluetzel, 456 U.S. 91, 71 L.Ed.2d 770, 102 S.Ct. 1549, (1982). Alvarado v. Gonzales, 552 S.W.2d 539 (Tex.Civ.App.--Corpus Christi 1977, no writ); Texas Department of Human Resources v. Delley, 581 S.W.2d 519 (Tex.-Civ.App.--Dallas 1979, ref'd, n.r.e.)

The Courts dealt with the problem of what the appropriate statute of limitations is applicable in paternity suits where the illegitimate child was born prior to the effective date of the sta-

tute (13.01), September 1, 1975, in the Delley case, supra. The Court of Civil Appeals held that since no specific statute of limitations was designated for paternity suits for children born before September 1, 1975, the general four year statute of limitations applied and that Article 5535, V.A.C.S., which tolls limitations during minority and disability, applies in those cases of children born before September 1, 1975.

Appellee says that even if the statute is tolled during Appellant's minority, she should have filed a paternity suit on or before November 1, 1980, which date is four years after the removal of her disability. Because Appellant failed in every respect to sue to establish paternity, such cause is barred.

Should the Court consider Appellant's argument that she should be enti-

tled to any benefits of the 1979 amendment to Section 42(b) of the Texas Probate Code, setting forth procedures for legitimation as a prerequisite to inheritance, Appellee says that Appellant failed in every respect to do any act to entitle her to such benefits. That statute provides four ways for an illegitimate child to prove entitlement to inheritance. First, the child must be born or conceived during the marriage of the father and mother; or second, the child is legitimated by court decree as provided by chapter 13 of the Texas Family Code; or third, the father has executed a statement of paternity as provided by Section 13.22 of the Texas Family Code; or fourth, the father has properly executed a like statement of paternity in another jurisdiction. Each element is mutually exclusive.



Appellant was born November 1, 1958. Under the laws of nature and undisputed herein, Appellant was not conceived until late January or early February, 1958, a time during which Prince Ricker was legally married to his first wife, Alice Rosemary Lawson. And, at the time of Appellant's birth, Prince Ricker was lawfully married to another woman, Jeri Laverne, not Appellant's mother. Thus, Appellant was not born or conceived during any claimed marriage between Annabel Boutwell and Prince Ricker.

No suit for paternity was ever instituted by Annabel Boutwell in the eighteen years Prince Ricker lived before Appellant's majority. Appellant never filed a suit to establish the paternity of Prince Ricker. Her claim for child support and Notice of Heirship filed in the instant case cannot be said to have been a suit to establish the parent-child



relationship as contemplated by Chapter 13, Sections 13.01 through 13.09 of the Texas Family Code. Further, she non-suited her claim for child support before the day of trial.

And, it is undisputed that Prince Ricker never executed a statement of paternity in Texas or any other jurisdiction pursuant to Section 13.22 of the Texas Family Code.

Thus, Appellant has failed in every respect to do one thing to establish herself as a legitimated child for inheritance under Section 42 of the Texas Probate Code, as amended.

Regarding Appellant's apparent contention that Section 37 of the Texas Probate Code is unconstitutional, Appellee says that in all her briefs filed in this case, this is the first forum in which this statute was ever cited. Appellee

urges the Court to dismiss Appellant's attack on such statute. Certainly the State of Texas has an important state interest in providing a certain time for the vesting of judicially enforceable rights, enabling an intestate or testator to know with certainty prior to death how and when his estate will devolve, and enabling devisees, heirs, and creditors to know with certainty when such judicially enforceable rights shall vest. Texas Probate Code, Section 37. Such important state interests outweigh Appellant's contention it operates to effectuate the 1955 version of Section 42 of the Texas Probate Code and throw up an insurmountable constitutional barrier.

Further, Appellee urges that no necessity exists for this Court to decide the question of whether Trimble v. Gordon, supra, should be applied retroactively in the case at bar. Whether

this Court determines that Appellant is unconstitutionally denied equal protection as an illegitimate child pursuant to the 1955 and 1977 versions of the Texas Probate Code, the Texas Court of Appeals decision in this case held:

"Even if the Plaintiff (Appellant) could claim under Section 42(b) as amended, her exclusion from the inheritance does not deny her constitutional equal protection since a rational state basis supports that legislation. Davis v. Jones, 626 S.W.2d 303 (Tex. 1982); Mills v. Edwards, *supra*." [emphasis ours]

The issue has been decided by the Texas state court on adequate non-federal bases. No attack on Probate Code, Section 42, as amended is made, and no infringement of Appellant's constitutional right to equal protection has been wrought. No substantial federal question exists. For these reasons, this appeal

should be dismissed, or alternatively the decision of the honorable Texas Court of Appeals decision herein should be affirmed.

The State of Texas through its legislative powers has set forth methods by which an illegitimate child may be legitimated for purposes of inheritance from the estate of its father. This Court has long recognized and given broad discretion to states in its important state interest of providing for "the stability of definitive determination of the valid ownership of property left by decedents". Labine v. Vincent, supra; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 31 L.Ed.2d 768, 776, 92 S.Ct. 1400 (1972); Lalli v. Lalli, supra. These cases further recognize the rare problems involved in establishing the child's relation to the mother but the frequent numerous pro-

blems in establishing the paternity of the putative father. Lalli v. Lalli, supra, addressed this problem in detail and found substantial state interests in treating mothers and putative fathers differently in the state's furtherance of its goals in the timely and orderly disposition of estates and the protection of estates from spurious claims of heirship. Such classifications are constitutional and no denial of equal protection has been visited upon Appellant.

#### CONCLUSION

WHEREFORE, Appellee respectfully submits that the decision below rests on adequate state grounds. Appellee respectfully moves the Court to dismiss this appeal and petition, or in the alternative, to affirm the judgment entered in the cause by the Court of Appeals for the Eighth Supreme Judicial District of

Texas on the basis that no substantial federal question has been presented by Appellant.

Respectfully submitted,



---

PAUL MCCOLLUM  
Counsel of Record for  
Appellee

and  
Kathleen M. McCulloch  
on the Brief  
SHAHER, GILLILAND, DAVIS,  
MCCOLLUM & ASHLEY, INC.  
P.O. Drawer 1552  
Odessa, Texas 79760  
(915) 332-0893

AFFIDAVIT OF MAILING

STATE OF TEXAS       )  
                              )  
COUNTY OF ECTOR     )

BEFORE ME, the undersigned authority, on this day personally appeared PAUL McCOLLUM, who, having been by me first duly sworn, upon his oath deposes and says that he is a member of the Bar of this Court; that he is attorney of record for Appellee herein; that he received Appellant's Jurisdictional Statement on October 17, 1985; that forty (40) copies of Appellee's Motion to Dismiss or Affirm were deposited in the United States mail at Odessa, Ector County, Texas, with first-class postage prepaid, properly addressed to the Clerk of the U. S. Supreme Court; and, that to my knowledge the mailing took place on the 16th day of November, 1985, within the time permitted for filing said Motion to Dismiss or Af-

firm, pursuant to Rule 28.2, Supreme Court Rules.

Three (3) copies each of the Motion to Dismiss or Affirm were deposited in the United States mail at Odessa, Ector County, Texas, first class postage prepaid, properly addressed to the following:

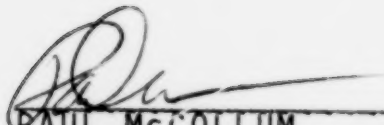
Mr. R. Stephen McNally  
Counsel of Record  
for Appellant  
P.O. Box 1586  
Austin, Texas 78767-1586

Mr. Jim Mattox  
Attorney General of the  
State of Texas  
Capitol Station  
P.O. Box 12548  
Austin, Texas 78711

I further state that to my knowledge the mailing took place on November 16, 1985, within the permitted time.

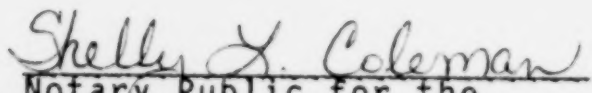
I have read the above and the matters set forth therein are to my knowledge true and correct.





PAUL MCCOLLUM  
ATTORNEY OF RECORD FOR  
APPELLEE

SUBSCRIBED AND SWORN TO before me on  
this the 16th day of November, 1985.



Notary Public for the  
State of Texas



**SHELLY L. COLEMAN**  
Notary Public, State of Texas  
My Comm. Expires Sept. 22, 1989

JAN 18 1986

JOSEPH F. SPANIOL, JR.  
CLERK

No. 85-755

In The  
**Supreme Court of the United States**

October Term, 1985

Delynda Ann Ricker Barker Reed,

*Appellant,*

v.

Princess Ann Ricker Campbell, Individually, and as Ad-  
ministratrix of the Estate of Prince Rupert Ricker, De-  
ceased,

*Appellee.*

On Appeal from the Court of Appeals for the  
Eighth Supreme Judicial District of Texas

**JOINT APPENDIX**

R. STEPHEN McNALLY  
P.O. Box 1586  
Austin, Texas 78767-1586  
(512) 474-1397

*Counsel of Record  
for Appellant*

PAUL McCOLLUM\*  
KATHLEEN McCULLOCH  
OF THE FIRM OF  
SHAFFER, GILLILAND, DAVIS,  
McCOLLUM & ASHLEY, INC.  
P.O. Drawer 1552  
Odessa, Texas 79760  
(915) 332-0893

*\*Counsel of Record  
Attorneys for Appellee*

Appeal Docketed October 15, 1985  
Probable Jurisdiction Noted December 9, 1985

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\* In the trial court, Appellant was the Plaintiff and Appellee was the Defendant.

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- a) the date it was filed;
- b) [in brackets] its page number in the official Transcript of the court's docket file, and
- c) a designation of the party requesting it, as follows: "D" for Defendant/Appellee Princess Ann Campbell; "P" for Plaintiff/Appellant, Delynda Ann Reed.

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32. Notice of Appeal to the Supreme Court of the United States; 9-30-85; (Reproduced at p. A.28 of the Appendix to the Jurisdictional Statement.)	
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NO. 486

IN THE COUNTY COURT OF  
REAGAN COUNTY, TEXAS.

ESTATE OF PRINCE RICKER,  
DECEASED.

APPLICATION FOR LETTERS OF  
ADMINISTRATION

(Filed December 23, 1976)

TO THE HONORABLE JUDGE OF SAID COURT:

PRINCESS ANN RICKER CAMPBELL, applicant,  
furnished the following information to the Court for issuance of Letters of Administration.

## I.

Applicant is an individual interested in this estate, domiciled in and residing at 1203 Mamosa, Odessa, Ector County, Texas, and was related to the decedent as his daughter.

## II.

Decedent died on December 22, 1976, in Kerrville, Kerr County, Texas, at the age of 45 years, leaving no last will and testament, insofar as applicant can determine by a diligent search.

## III.

This Court has jurisdiction and venue, even though decedent had no domicile or fixed place of residence in Texas, because decedent died in Texas and decedent's principal property was in this county at the time of decedent's death.

## IV.

Decedent owned real and personal property described generally as personal possessions and mineral interests, of a probable value in excess of \$10,000.

## V.

There is a necessity for administration of the estate of the decedent since there are debts owing by the estate which are not secured by liens on real property.

## VI.

Applicant was related to decedent as his daughter, and is designated by statute as having the preferential right to letters of administration, as administrator of the estate, in which capacity applicant is not disqualified by law from serving or from accepting letters of administration, and applicant is entitled to such letters.

WHEREFORE, applicant prays that citation issue as required by law to all persons interested in this estate and that letters of administration be issued to applicant, and that all other orders be entered as the Court may deem proper.

Respectfully submitted,

SHAFFER, GILLILAND, DAVIS,  
BUNTON & McCOLLUM, INC.

/s/ By Lucius D. Bunton  
ATTORNEYS FOR APPLICANT

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(Caption of Probate Court omitted in printing)

PROOF OF LETTERS OF ADMINISTRATION

(Filed January 3, 1977)

On this day PRINCESS ANN RICKER CAMPBELL personally appeared in open Court, and after being duly sworn, deposes and says that:

1. Prince Ricker died on December 22, 1976, in Kerrville, Kerr County, Texas, at the age of 43 years, and four years have not elapsed since the date of decedent's death.
2. Decedent died in Texas and decedent's principal property was in this county at the time of his death; however, he had no domicile or fixed place of residence in Texas.
3. The decedent died leaving no last will and testament, so far as I know or believe.
4. The decedent left debts owing by his estate which are not secured by liens on real property.
5. The applicant, PRINCESS ANN RICKER CAMPBELL, applying for letters of administration, is not disqualified by law from accepting letters of administration or from serving as administrator and is entitled to such letters.

SIGNED this 3rd day of January, 1977.

/s/ Princess Ann Ricker Campbell  
Affiant

(Jurat omitted in printing)

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(Caption of Probate Court omitted in printing)

ORDER GRANTING LETTERS OF  
ADMINISTRATION

(Filed January 3, 1977)

On this day came on to be heard the written application of PRINCESS ANN RICKER CAMPBELL, filed with the Court on the 23rd day of December, 1976, for letters of administration on the Estate of Prince Ricker, Deceased. There was presented in open Court proof that citation and notice as required by law have been duly issued, served, and returned in the manner and for the length of time required by law.

Having considered the evidence and papers on file in this cause and being fully advised in the premises, the Court finds therefrom that all of the statements and allegations contained in application for letters of administration are true and correct.

The Court further finds it has jurisdiction and venue over this estate.

The Court finds that the said Prince Ricker died at the age of 43 years on the 22nd day of December, 1976, in Kerrville, Kerr County, Texas leaving no last will and testament.

The Court finds that there are debts owing by the estate which are not secured by liens on real estate and there exists a necessity for an administration on this estate. No objection or contest to the issuance of letters of administration to the applicant has been filed. The Court finds that the applicant did not have a domicile or fixed place of residence in Texas and that the decedent's principal property was in this county at the time of his death.

The Court further finds that the applicant is a resident of and domiciled in Ector County, Texas, and is not disqualified to serve as administratrix of the estate, and is entitled to the issuance of letters of administration.

After hearing evidence on the extent of the personal property of the estate, anticipated revenues, and debts which are owing, the Court hereby fixes the bond of the administrator at \$1000.00.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that PRINCESS ANN RICKER CAMPBELL is hereby appointed as administratrix of the Estate of Prince Ricker, Deceased, and that letters of administration issue upon her taking the oath authorized by law, and upon the posting of a bond in the amount of \$1000.00.

IT IS FURTHER ORDERED that there is no necessity for the appointing of appraisers of this estate.

SIGNED AND ENTERED this 3rd day of January, 1977.

/s/ W. S. Mills  
Judge Presiding

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(Caption at Probate Court omitted in printing)

# OATH

(Filed January 3, 1977)

I do solemnly swear that PRINCE RICKER died without leaving any lawful will, so far as I know or believe, and that I will well and truly perform all the duties of administratrix of the Estate of PRINCE RICKER, Deceased.

/s/ Princess Ann Ricker Campbell  
Administratrix

(Jurat omitted in printing)

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## TRINITY UNIVERSAL INSURANCE COMPANY

DALLAS, TEXAS

BOND AND OATH OF EXECUTOR,  
ADMINISTRATOR OR GUARDIAN

(Filed January 10, 1977)

THE STATE OF TEXAS     )  
                                      ) ss.  
County of Ector             )

IN THE COUNTY COURT, Reagan County, Texas  
KNOW ALL MEN BY THESE PRESENTS:

That we, Princess Ann Ricker Campbell as Principal,  
and TRINITY UNIVERSAL INSURANCE COMPANY,  
as Surety, are held and firmly bound unto the County  
Judge of Reagan County, and his successors in office, in  
the sum of One Thousand and no/100, (\$1,000.00) Dollars,  
conditioned that the above bounden Principal who has been  
appointed Administratrix of the Estate of Prince Ricker,  
Deceased shall well and truly, faithfully perform all the  
duties required of him under said appointment.

Dated this 3rd day of January, 1977.

/s/Princess Ann Ricker Campbell  
Principal

TRINITY UNIVERSAL  
INSURANCE COMPANY

/s/David R. Hisaw  
Attorney in Fact

(Unsigned Jurat form omitted in printing)

The above (—deleted in original) approved the 10  
day of January, 1977.

/s/ W. S. Mills  
County Judge,  
Reagan County, Texas

(Caption at Probate Court omitted in printing)

## NOTICE OF HEIRSHIP

(Filed February 16, 1978)

TO THE HONORABLE JUDGE OF SAID COURT:

DELYNDA ANN RICKER BARKER REED, hereby  
places this Court, PRINCESS ANN RICKER CAMP-  
BELL, Administratrix of the Estate of Prince Ricker, de-  
ceased, and all other persons interested in the Estate of  
PRINCE RICKER, deceased, on notice of the fact that  
DELYNDA ANN RICKER BARKER REED is entitled  
to a share of this Estate according to the Statutes of De-  
scend and Distribution of the State of Texas. In support  
of this Notice of Heirship, reference is hereby made to the  
attached Exhibit A which explains fully the facts of DE-  
LYNDA ANN RICKER BARKER REED's heirship  
rights.

Respectfully submitted,

BROWN, BANCROFT &amp; MILLER

BY /s/ Roger Brown  
Attorneys for  
Delynda Ann Ricker Barker Reed

(Jurat omitted in printing)

"Exhibit A"

## SUPPORTING AFFIDAVIT

STATE OF TEXAS  
COUNTY OF HOWARD

Before me, the undersigned authority, a Notary Public  
in and for Howard County, Texas, on this day per-  
sonally appeared Annabel Barker, known to me to be a



credible person over the age of 21 years, and being first by me duly sworn, on her oath, deposes and says:

"That I, Annabel Barker, married Prince Rupert Ricker on or about the 24th or 27th day of November, 1957, in Juarez, Mexico. The said Prince Rupert Ricker and myself lived together as husband and wife at 200 N. Goliad Street, Big Spring, Howard County, Texas, for a period beginning in November, 1957 and ending in June, 1958. One child was born of said marriage on November 1, 1958, her name being Delynda Ann Ricker, and a true and correct copy of said child's certificate of birth is attached hereto and incorporated herein by reference and made a part hereof for all purposes.

This Affidavit is made in connection with the showing of the facts of heirship between Prince Ricker, deceased, and Delynda Ann Ricker Barker Reed.

Further, Affiant saith not."

/s/ Annabel Barker

(Jurat omitted in printing)

\_\_\_\_\_  
(Certificate of Service omitted in printing)

(Caption at Probate Court omitted in printing)

### CLAIM

(Filed February 16, 1978)

TO: PRINCESS ANN RICKER CAMPBELL, Administratrix of the Estate of PRINCE RICKER, Deceased.

The undersigned herewith presents a Claim against the estate of the deceased, to PRINCESS ANN RICKER CAMPBELL, Administratrix of the Estate, for approval.

This Claim is based upon the decedent's failure to support his minor child, DELYNDIA ANN RICKER BARKER REED, when he was under a legal duty to do so. The undersigned hereby claims, based upon a duty to contribute \$100.00 per month to the support of his minor child, that the amount of \$21,600.00 is due, owing and payable to the claimant herein. (See Supporting Affidavit attached hereto.)

/s/Delynda Ann Ricker Barker Reed

(Certificate of Service omitted in printing)

### SUPPORTING AFFIDAVIT

STATE OF TEXAS     )  
                                  )  
COUNTY OF HOWARD )

Before me, the undersigned authority, a Notary Public in and for Howard County, Texas, on this day personally appeared ANNABEL PARKER, known to me to be a credible person over the age of 21 years, and being first by me duly sworn, on her oath, deposes and says:

"That I, Annabel Barker, married Prince Rupert Ricker on or about the 24th or 27th day of November, 1957, in Juarez, Mexico. The said Prince Rupert Ricker and myself lived together as husband and wife at 200 N. Goliad Street, Big Spring, Howard County, Texas, for a period beginning in November, 1957, and ending in June, 1958. One child was born of said marriage on November 1, 1958, her name being Delynda Ann Ricker Barker Reed. Prince Rupert Ricker, deceased, at no time from the date of said Delynda Ann Ricker Barker Reed's birth, contributed to the support of said child. This claim is just and correct, and all legal offests, payments and credits known to me have been allowed."

/s/ Annabel Barker

(Jurat omitted in printing)

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NO. 2567

IN THE DISTRICT COURT  
OF REGAN COUNTY, TEXAS  
83RD JUDICIAL DISTRICT

DELYNDA ANN RICKER BARKER REED

VS.

PRINCESS ANN RICKER CAMPBELL,  
INDIVIDUALLY AND AS  
ADMINISTRATRIX OF THE ESTATE  
OF PRINCE RICKER, DECEASED

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, DELYNDA ANN RICKER BARKER REED, hereinafter called Plaintiff, complaining of PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PRINCE RICKER, hereinafter called Defendant, and for cause of action would show the Court the following:

I.

Plaintiff is a resident of Big Spring, Howard County, Texas and Defendant is a resident of Odessa, Ector County, Texas and may be served with citation at 1203 Mimosa, Odessa, Ector County, Texas.

II.

That Prince Ricker died intestate on December 22, 1976; that on December 23, 1976 In the Matter of the Estate of Prince Ricker, deceased, number 486, pending in the Probate Court of Reagan County, Texas, the Defendant

was appointed Administratrix of said Estate; that on January 3, 1977, Princess Ann Ricker Campbell took to oath as authorized and required by law; that on January 10, 1977, Defendant Princess Ann Ricker Campbell posted Bond in the amount of \$1,000.00, said such bond was approved by the Court on the same date; that Defendant is now, and ever since January 19, 1977, has been the duly appointed, qualified and acting Administratrix of the Estate of Prince Ricker.

### III.

That said Administratrix has not published a notice of the issuance of said Letters of Administration to her and requiring all persons having claims against said Estate to present the same within the time required by law; that on February 16, 1978. Plaintiff presented her duly authenticated and verified claim with supporting affidavit, to said Administratrix; that on March 18, 1978, said Administratrix rejected said claim by failing to make any notation on her memorandum stating that she rejected or approved the same; that copies of said claim and supporting affidavit are attached hereto and marked Exhibit "A" and incorporated herein by reference.

### IV.

That this suit is commenced within the statutory period of 90 days after rejection.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein and that upon final hearing Plaintiff recover Judgment against the Defendant, Individually and as Administratrix of the Estate of Prince Ricker, in a sum greatly

in excess of the Jurisdictional requirement of this court, interest at the rate allowed by law, costs of court and for such other and further relief, general and special, at law and equity, to which Plaintiff may be entitled.

BROWN, BANCROFT & MILLER  
P.O. Drawer 2139  
Big Spring, Texas 79720

/s/ Drew Mouton  
ATTORNEYS FOR PLAINTIFF

(Printer's Note:

Exhibit A—Claim for \$21,000 for child support, already reprinted at page 13.

Exhibit B—Supporting affidavit of Annabel Boutwell, already reprinted at pages 13-14.)

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(Caption of District Court omitted in printing)

DEFENDANT'S ORIGINAL ANSWER

(Filed July 28, 1978)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PRINCESS ANN RICKER CAMPBELL, individually, and as Administratrix of the Estate of PRINCE RICKER, Deceased, Defendant herein, and for answer to Plaintiff's pleadings would respectfully show the following:

I.

This Defendant admits the allegations contained in Paragraphs I and II of Plaintiff's Original Petition heretofore filed.

II.

Defendant says that in her capacity as Administratrix of the Estate of PRINCE RICKER, Deceased, she did in fact reject the claim previously filed by Plaintiff herein. The claim was rejected because the same was not true, in that such claim sought to recover for child support allegedly owed by Prince Ricker during his lifetime, when in truth and in fact no child support was owed to the claimant at the time of the death of Prince Ricker or at any time prior thereto. The claim as presented asked for \$100 per month for child support when claimant was not in fact the child of Prince Ricker, and no child support was due.

III.

Defendant says that the supporting Affidavit executed by ANNABELLE BARKER alleges that ANNABELLE RICKER and PRINCE RICKER were married in Juarez, Mexico on November 27, 1957.

Defendant says that such marriage, if in fact it took place, was void. PRINCE RICKER, on November 27, 1957 was married to ALICE ROSEMARY RICKER, and such marriage was not terminated until February 28, 1958, the marriage to ALICE ROSEMARY RICKER having taken place several years prior to 1957.

IV.

Defendant says that during the lifetime of PRINCE RUPERT RICKER, there was never a legal, valid marriage to ANNABELLE BARKER, and no child could have been born of a marriage between PRINCE RICKER and ANNABELLE BARKER, and claimant never at any time sought to recover any child support nor made any allegations that claimant was in fact the child of PRINCE RICKER.

V.

Defendant further says that the claim of Plaintiff is barred in whole or in part by the 2-yr. Statute of Limitations of the Civil Statutes of the State of Texas.

VI.

Defendant denies generally, all and singular, the allegations relating and pertaining to the claim, and demands strict proof thereof.

VII.

Defendant says that Plaintiff herein is not, and never has been, an heir of PRINCE RICKER.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the claim of DELYNDIA ANN RICKER



BARKER REED be in all things rejected and Plaintiff's alleged cause of action be dismissed with prejudice, and Defendant be allowed to go hence and recover her costs in this behalf expended.

/s/ Princess Ann Ricker Campbell  
Individually, and as Administratrix  
of the Estate of PRINCE RICKER,  
Deceased, DEFENDANT

SHAFFER, GILLILAND, DAVIS,  
BUNTON & McCOLLUM, INC.  
P.O. Drawer 1552  
Odessa, Texas 79760

/s/ Lucius D. Bunton  
ATTORNEYS FOR DEFENDANT

(Jurat omitted in printing)

(Certificate of service omitted in printing)

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NOTICE TO ALL PERSONS HAVING CLAIMS  
AGAINST THE ESTATE OF  
RUPERT P. RICKER, DECEASED

(Filed November 9, 1978)

Notice is hereby given that original Letters Testamentary for the Estate of RUPERT P. RICKER were issued on the 28th day of April, 1977, in Cause No. 486, pending in the County Court of Reagan County, Texas, to:

PRINCESS ANN RICKER CAMPBELL

The residence of such Executrix is Ector County, Texas. The post office address is:

Princess Ann Ricker Campbell  
1203 Mimosa Circle  
Odessa, Texas 79762

All persons having claims against this Estate which is currently being administered are required to present them within the time and in the manner prescribed by law.

DATED the 18th day of October, 1978.

PRINCESS ANN RICKER CAMPBELL

By: /s/ Richard E. Buck  
Attorney for the Estate

(Jurat of Publisher's Affidavit of publication on  
October 26, 1978, omitted in printing)

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(Caption of County Probate Court omitted in printing)

APPLICATION TO DETERMINE HEIRSHIP

(Filed February 27, 1979)

TO THE HONORABLE JUDGE OF SAID COURT:

DELYNDA ANN RICKER BARKER REED, Petitioner herein is a resident of Big Spring, Howard County, Texas and is a surviving daughter of PRINCE RICKER, Deceased, who died intestate on December 22, 1976, in Kerr County, Texas.

The names and residences of decedent's heirs, all of whom are named herein as Petitioner or Respondents, are:

Princess Ann Ricker Campbell, 1203 Mimosa, Odessa, Texas 79760

Rosemary Jane Ricker                      Unknown

Prince Ricker Jr.                              Unknown

Brett Drayton Ricker                      Unknown

Mark Ricker                                      Unknown

Delynda Ann Ricker Barker Reed, Sterling City Rt., Box 1603, Big Spring, Texas 79720

On the date of decedent's death, he owned the following described real and personal property:

1. A 2,880 acre ranch located in Reagan County, Texas, and valued at \$171,983.00.

2. Mortgages, Notes and Cash totaling \$52,136.00.

Petitioner herein owns an interest in and to all of the above described estate, and Petitioner and Respon-

dent's named herein are the sole and only heirs of said decedent.

The true and correct shares of Petitioner and of each of the heirs named as Respondents herein in the estate of the decedent are as follows:

Princess Ann Ricker Campbell              1/6th

Rosemary Jane Ricker                      1/6th

Prince Ricker Jr.                              1/6th

Brett Drayton Ricker                      1/6th

Mark Ricker                                      1/6th

Delynda Ann Ricker Barker Reed 1/6th

WHEREFORE, Petitioner prays that citation issue to all said Respondents as required by law, and that on final hearing hereof, this court determine, declare, and adjudge who are the heirs and only heirs of the decedent, PRINCE RICKER; that the Court in particular, determine, declare and adjudge that Petitioner has a 1/6th interest in and to the estate of the decedent; and for such other relief to which she may be entitled.

/s/ Delynda Ann Ricker Barker Reed  
BROWN, BANCROFT & MILLER  
P.O. Drawer 2139  
Big Spring, Texas 79720

/s/ Drew Mouton

ATTORNEYS FOR DELYNDA  
ANN RICKER BARKER REED

(Jurat omitted in printing)

(Caption of County Probate Court omitted in printing)

OBJECTION AND ANSWER  
TO APPLICATION TO DETERMINE HEIRSHIP

(Filed March 30, 1979)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes PRINCESS ANN RICKER CAMPBELL, individually and as administratrix of the estate of PRINCE RICKER, deceased, and as objection to and answer to the application to determine heirship heretofore filed, would show the Court as follows:

1.

PRINCESS ANN RICKER CAMPBELL denies each and every, all and singular, the allegations in the Application to Determine Heirship, and demands strict proof thereof.

2.

That the only heirs at law of PRINCE RICKER, deceased, are as follows:

Princess Ann Ricker Campbell, Rosemary Jane Ricker, Prince Ricker, Jr., Brett Drayton Ricker, Mark Ricker

3.

That the said Delynda Ann Ricker Barker Reed, applicant, is not an heir at law of Prince Ricker for the reason that the said Delynda Ann Ricker Barker Reed is not the lawful child of PRINCE RICKER, deceased, and has no legal or lawful interest in the property of PRINCE RICKER, deceased.

Wherefore premises considered, the undersigned prays that on the trial hereof the Court find that Princess Ann

Ricker Campbell, Rosemary Jane Ricker, Prince Ricker, Jr., Brett Drayton Ricker and Mark Ricker are the heirs at law of PRINCE RICKER, and that Delynda Ann Ricker Barker Reed be declared not an heir at law. That the undersigned be allowed to go hence and recover her costs in this behalf expended.

/s/ Princess Ann Ricker Campbell  
Individually and as Administratrix  
of the Estate of Prince Ricker,  
deceased

/s/ Lucius D. Bunton  
Attorney for the Estate

(Certificate of Service omitted in printing)

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(Caption of County Probate Court omitted in printing)

OBJECTION AND ANSWER TO  
APPLICATION TO DETERMINE HEIRSHIP

(Filed November 2, 1979)

TO THE HONORABLE JUDGE OF SAID COURT:

Come MS. ROSEMARY JANE RICKER, a/k/a GINA RICKER, and MRS. MARYLYN RICKER WATTS, Guardian of Prince Ricker, Jr., Brett Drayton Ricker and Mark Ricker, Minors, and as objection to and answer to the Application to Determine Heirship heretofore filed, would show the Court as follows:

I.

ROSEMARY JANE RICKER, a/k/a GINA RICKER and MARYLYN RICKER WATTS, Guardian of Prince Ricker, Jr., Brett Drayton Ricker and Mark Ricker, Minors, deny each and every all and singular the allegations in the Application to Determine Heirship and demand strict proof thereof.

II.

That the only heirs at law of PRINCE RICKER, Deceased, are as follows:

Princess Ann Ricker Campbell, Rosemary Jane Ricker a/k/a Gina Ricker, Prince Ricker, Jr., Brett Drayton Ricker, and Mark Ricker.

III.

That the said Delynda Ann Ricker Barker Reed, Applicant, is not an heir at law of PRINCE RICKER, Deceased, for the reason that said Delynda Ann Ricker Barker

Reed is not the lawful child of PRINCE RICKER, Deceased, and has no legal or lawful interest in the property of PRINCE RICKER, Deceased.

WHEREFORE, PREMISES CONSIDERED, the undersigned prays that on the trial hereof the Court find that PRINCESS ANN RICKER CAMPBELL, ROSEMARY JANE RICKER a/k/a GINA RICKER, PRINCE RICKER, JR., BRETT DRAYTON RICKER and MARK RICKER are the heirs at law of PRINCE RICKER, Deceased, and that Delynda Ann Ricker Barker Reed be declared not an heir at law. That the undersigned be allowed to go hence and recover their costs in this behalf expended.

/s/ Lucius D. Bunton  
Attorney for  
Rosemary Jane Ricker a/k/a Gina  
Ricker, and Marylyn Ricker Watts,  
Guardian of Prince Ricker, Jr.,  
Brett Drayton Ricker and  
Mark Ricker

(Certificate of Service omitted in printing)

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(Caption of County Probate Court omitted in printing)

DEFENDANT'S MOTION TO DISMISS  
OR ALTERNATIVELY, DEFENDANT'S  
PLEA IN ABATEMENT

(Filed March 23, 1981)

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, PRINCESS ANN RICKER CAMPBELL, respectfully presents this Motion to the Court, asking that the Court transfer and dismiss this action now pending, or in the alternative, abate this proceeding, and as grounds therefore would respectfully show to the Court as follows:

1.

V.A.C.S., Probate Code, Section 5, expressly mandates that in those counties where there is no statutory probate Court, County Court at Law or other statutory Court exercising probate jurisdiction, where probate matters are contested, the matter shall be transferred to the District Court upon the Motion of any party to the proceeding. V.A.C.S., Probate Code, Section 5, states in pertinent part as follows:

“(b) In those counties where there is no statutory probate court, county court at law or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate, administrations, guardianships, and mental illness matters shall be filed and heard in the county court, *except that in contested probate matters*, the Judge of the county court may on his motion, or shall on the motion of any party to the proceeding transfer such proceeding to the district court, which may then hear such proceeding as if originally filed in such court. In contested matters transferred

to the district court in those counties, the district court, concurrently with the county court, shall have the general jurisdiction of a probate court. . . .)”

Further, the 1973 constitutional amendment to Article V, Section 8 of the Constitution of the State of Texas provides “The district court, concurrently with the county court, shall have the general jurisdiction of a probate court.”

2.

On December 22, 1976, Prince Rupert Ricker died intestate. Thereafter, on December 23, 1976, Defendant was appointed Administratrix of the Estate of Prince Rupert Ricker, Deceased in this cause, and on January 3, 1977, Defendant took oath as required by law and posted bond on January 10, 1977, in the amount of \$1,000.00, such bond being approved by this Court. The Administration on said Estate is still pending before this Court.

On February 16, 1978, Plaintiff filed a claim against said Estate claiming to be the minor child of the Decedent and claiming child support in the amount of \$21,600.00. This claim was rejected by operation of law pursuant to V.A.C.S., Probate Code, Section . Thereafter, on July 15, 1978, Plaintiff filed an instrument entitled “Plaintiff's Original Petition” in the 83rd Judicial District Court of Reagan County, Texas, being Cause No. 2567 and styled “Delynda Ann Ricker Barker Reed vs. Princess Ann Ricker Campbell, Individually and as Administratrix of the Estate of Prince Ricker, Deceased,” along with the Affidavit of Annabel Barker stating that Plaintiff is the child of a purported marriage between the deceased and the said Annabel Barker. Defendant timely answered the allegations contained therein and rejected

Plaintiff's claim and denied Plaintiff was an heir at law of the deceased. A copy of said claim, Plaintiff's Original Petition and Defendant's Answer is attached hereto as Exhibits "A-C" respectively, and incorporated herein by reference.

3.

During the time that the abovementioned cause of action was pending in the District Court, Plaintiff filed in this Court on February 27, 1979 an instrument entitled "Application to Determine Heirship," which instrument also alleged Plaintiff to be an heir at law of the deceased. In answer to this application, Defendant timely filed its "Objection and Answer to Application to Determine Heirship", again denying any and all of Plaintiff's claims against said Estate. A copy of such Application and Objection is attached hereto as Exhibits "D & E", respectively and incorporated herein by reference.

4.

The parties in the present and former actions are the same and both of these suits seek to establish the Plaintiff as a lawful heir to the Estate of Prince Rupert Ricker, Deceased and Plaintiff's respective claims against and interests in and to said Estate.

5.

The Plaintiff's Original Petition filed in the District Court is still pending and all discovery efforts made by Plaintiff, such as the taking of depositions of witnesses, have been made in connection with Plaintiff's suit filed in the District Court. Further, the Defendant states that the abovementioned discovery relates directly to and is

concerned with its allegation that the Plaintiff is a lawful heir to said Estate.

6.

Defendant believes that the final judgment entered in the formerly filed and now pending District Court action will be a full and final determination of all the issues presented in this action.

7.

Further, Defendant states that its position in both suits filed by Plaintiff has been, at all times, that Plaintiff is not and never has been an heir at law of Prince Rupert Ricker, Deceased, and that Plaintiff therefore is not entitled to any interest in his estate.

8.

Defendant states that at all times from its receipt of notice of Plaintiff's claims in both causes of action, it has contested and denied and still continues to contest and deny any and all claims of Plaintiff against the Deceased's Estate.

9.

Because Plaintiff's cause of action against Defendant was pending in the 83rd Judicial District Court of Reagan County, Texas some 7 ½ months prior to the filing of its Application to Determine Heirship filed in this Court, and because both causes of action involve the same parties and questions of fact and of law, it would be appropriate for this Court to transfer to the District Court this cause of action and to dismiss the cause of action now pending before it, or alternatively to abate all proceedings in the above entitled cause, pursuant to V.A.C.S.,

Probate Code, Section 5 and Article V, Section 8 of the Constitution of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that all proceedings in the above entitled cause be transferred to the cause now pending in the 83rd Judicial District Court of Reagan County, Texas and that this cause of action now pending in this Court be dismissed, that Plaintiff take nothing by its petition and that the action against the Defendant be dismissed and Defendant be awarded his cause and such other relief as the Court may deem proper; or, alternatively that all proceedings in the above entitled cause be abated and that the Defendant recover its costs in this behalf expended.

Respectfully submitted,  
SHAFFER, GILLILAND, DAVIS,  
McCOLLUM & ASHLEY, INC.  
P.O. Drawer 1552  
Odessa, Texas 79760  
(915) 332-0893

/s/ By: PAUL McCOLLUM  
State Bar Card Number 13436000

(Jurat omitted in printing)

(Certificate of Service omitted in printing)

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(Caption of County Probate Court omitted in printing)

# ORDER OF CONSOLIDATION

(Filed April 20, 1981)

On considering the Motion of Defendant, PRINCESS ANN RICKER CAMPBELL, Defendant in the above entitled and numbered cause, and Administratrix of the Estate of PRINCE RICKER, Deceased, it appears to the Court that said cause should be consolidated with the case entitled "Delynda Ann Ricker Barker Reed vs. Princess Ann Ricker Campbell, Individually and As Administratrix of the Estate of Prince Ricker, Deceased," being Cause Number 2567, now pending in the 83rd Judicial District Court of Reagan County, Texas.

IT IS, THEREFORE, ORDERED that said causes shall be consolidated and a consolidated suit shall proceed under the style "Delynda Ann Ricker Barker Reed vs. Princess Ann Ricker Campbell, Individually and As Administratrix of the Estate of Prince Ricker, Deceased", being Cause Number 2567 in the 83rd Judicial District Court of Reagan County, Texas.

SIGNED this the 20 day of April, 1981.

/s/ FRANK SANDEL  
JUDGE PRESIDING

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(Caption of District Court omitted in printing)

DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

(Filed December 28, 1981)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, PRINCESS ANN RICKER CAMPBELL, Individually and as Administratrix of the Estate of Prince Ricker, Deceased, in the above styled and numbered cause, and after having fully answered herein, makes this her Motion for Summary Judgment pursuant to Rule 166-A of the Texas Rules of Civil procedure, on all issues in this cause as against Plaintiff, and as grounds therefor would respectfully show to the Court as follows:

1.

As alleged by both Plaintiff and Defendant, Prince Rupert Ricker died intestate on December 22, 1976. Thereafter, on December 23, 1976, Defendant was appointed Administratrix of the Estate of Prince Rupert Ricker, Deceased in Cause No. 486 styled "Estate of Prince Ricker, Deceased", then pending in the County Court of Reagan County, Texas, sitting in probate and on January 3, 1977, Defendant took oath as required by law and posted bond on January 10, 1977, in the amount of \$1,000.00, such bond being approved by said County Court sitting in probate. Said administration of the Estate is still pending.

2.

Thereafter, on February 16, 1978, Plaintiff filed a claim against the Estate of Prince Ricker, Deceased in said

Cause No. 486 in the County Court of Reagan County, Texas, claiming to be the minor child of the decedent and praying for child support in the amount of \$21,000.00, such claim being rejected by operation of law pursuant to the Probate Code of the State of Texas.

3.

On 6-15-78, Plaintiff filed an instrument entitled "Plaintiff's Original Petition" in the 83rd Judicial District Court of Reagan County, Texas, being Cause No. 2567 and styled "Delynda Ann Ricker Barker Reed vs. Prince Ricker, Deceased, claiming to be the minor child of Prince Rupert Ricker, Deceased, of a purported marriage between the deceased and Annabel Barker, alleged to have taken place in Juarez, Mexico on or about November 24th or 27th, 1957."

Defendant timely answered the allegations contained therein and rejected Plaintiff's claim and denied that Plaintiff was an heir at law of the deceased, Plaintiff's Original Petition and Defendant's Answer thereto being on file with this Court among the papers of this cause, and being incorporated herein by reference.

4.

Defendant thereafter filed an instrument entitled "Defendant's Motion to Dismiss or Alternatively, Defendant's Plea in Abatement" in Cause No. 486 in the abovementioned Cause No. 486 in the County Court of Reagan County, Texas, seeking transferrance and consolidation, or alternatively, abatement, of said Cause No. 486, to the also then pending suit on file in the 83rd Judicial District

Court of Reagan County, Texas, being Cause No. 2567, and styled "Delynda Ann Ricker Barker Reed vs. Princess Ann Ricker Campbell, Individually and as Administratrix of the Estate of Prince Ricker, Deceased", due to the fact that both pending actions involved the same parties and both of said suits sought to establish the Plaintiff as a lawful heir to the Estate of Prince Ricker, Deceased, and Plaintiff's respective claims against and interests in and to said Estate, being certain mineral interests in lands.

Thereafter, on April 20, 1981, after hearing and notice, Judge Frank Sandel, presiding Judge of the County Court of Reagan County, Texas signed an Order of Consolidation in Cause No. 486, consolidating said Cause No. 486 pending in the County Court with Cause No. 2567 pending in the 83rd Judicial District Court of Reagan County, Texas, reference being hereby made to said "Defendant's Motion to Dismiss or Alternatively, Defendant's Plea in Abatement" and the "Order of Consolidation" on file with this Court, for all purposes.

## 5.

Defendant would show that at all times material hereto, Defendant's mother, Annabel Barker, was not married to the deceased, Prince Rupert Ricker, and that Plaintiff, if she was in fact a child of Prince Rupert Ricker, Deceased, which is not admitted, was for all purposes an illegitimate child.

Defendant would further show that at the time of the purported marriage of the Deceased and Plaintiff's mother, Annabel Barker, the deceased, Prince Rupert Ricker, was lawfully married to Alice Rosemary Ricker,

Defendant's mother. Prince Rupert Ricker, Deceased, was married to Alice Rosemary Ricker on or about September 27, 1954, in Dallas County, Texas, and was not divorced from the said Alice Rosemary Ricker until February 28, 1958.

Attached hereto and incorporated herein by reference for all purposes is a certified copy of the Judgment decreeing a divorce between Alice Rosemary Ricker and Prince Rupert Ricker, signed by the Judge on February 28, 1958 in Cause No. 11,122 in a suit styled "Alice Rosemary Ricker vs. Prince Rupert Ricker" in the 118th Judicial District Court of Howard County, Texas. A certified copy of such Judgment is attached hereto as Exhibit "B".

Also attached hereto and incorporated herein by reference for all purposes is a certified copy of the Marriage License of Prince Rupert Ricker and Alice Rosemary Lawson, certifying their marriage on September 27, 1954, which certified copy is attached hereto as Exhibit "A", and Affidavit of Thelma Barham, attached hereto as Exhibit "C".

## 6.

Defendant says that there was no decree of divorce ever entered dissolving the purported marriage of Prince Rupert Ricker, Deceased, and Annabel Barker, and Defendant states that none exists. Further, this Defendant denies that there ever was any purported marriage and that Plaintiff, Delynda Ann Ricker Barker Reed, if she is a child of Prince Rupert Ricker, which is denied, is illegitimate.

7.

In summary, Defendant states that Prince Rupert Ricker, Deceased, died on December 22, 1976, intestate. On December 23, 1976, Defendant was appointed Administratrix of the Estate of Prince Ricker, Deceased, took oath as required by law on January 3, 1977 and posted bond on January 10, 1977. A certified copy of Letters of Administration granted Defendant is attached hereto and incorporated herein for all purposes as Exhibit "D".

On February 16, 1978, Plaintiff filed a claim against the Estate in Cause No. 486 in the County Court of Reagan County, Texas, which was rejected by operation of law, and thereafter, on July 15, 1978, Plaintiff filed an Original Petition in this Court, the 83rd Judicial District Court of Reagan County, Texas, against this Defendant.

Thereafter, on April 20, 1981, the two pending actions were consolidated by Order of the Court and now proceed under this cause of action, being Cause No. 2567 in the 83rd Judicial District Court of Reagan County, Texas.

8.

Defendant would further show to the Court that neither Plaintiff, nor Plaintiff's mother, nor any other representative of Plaintiff has filed suit to establish the parent-child relationship between Plaintiff and Prince Rupert Ricker, Deceased, and that the claim and Cause of Action filed by Plaintiff is barred by the statute of limitations.

9.

Defendant would show that the pleadings, together with the Affidavit and Exhibits attached hereto, show

that there is no genuine issue as to any material fact and that this Defendant is entitled to Judgment in this cause of action as a matter of law, for which this Defendant respectfully prays.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Motion for Summary Judgment be granted in favor of this Defendant, that Defendant be granted its costs of suit, and for such other relief, either at law or in equity, to which this Defendant may show itself to be justly entitled.

Respectfully submitted,

SHAHER, GILLILAND, DAVIS, McCOLLUM  
& ASHLEY, INC.

P. O. Drawer 1552  
Odessa, Texas 79760  
(915) 332-0893

By: /s/ PAUL McCOLLUM  
State Bar #13436000

ATTORNEYS FOR DEFENDANT

(Certificate of Service omitted in printing)

# EXHIBIT "A"

THE STATE OF TEXAS, )

County of Dallas. )

To any Regularly Licensed or Ordained Minister of the Gospel, Jewish Rabbi, Judge of the District or County Court, or Justice of the Peace in the State of TEXAS—  
GREETING:

YOU ARE HEREBY AUTHORIZED To Celebrate the Rites of Matrimony between Mr. Prince Rupert Ricker, and Miss Alice Rosemary Lawson and make due return to the County Clerk of said County, within sixty days thereafter, certifying your action under this License.

WITNESS My official signature and seal of office, at office in Dallas, this 27th day of September, A.D. 1954

(L.S.) ED H. STEGER, County Clerk,  
By O. H. Crossett, Deputy.

I, A Minister of the gospel, hereby certify that on the 27th day of September, A.D. 1954, I united in Marriage Prince Rupert Ricker and Alice Rosemary Lawson the parties above mentioned.

WITNESS My hand, this 27th day of September, A.D. 1954.

THE ORIGINAL OF	Alsie H. Carleton,
THIS MARRIAGE	Dallas, Texas
LICENSE WAS IS-	.....
SUED IN ACCORD-	.....
ANCE WITH	
HOUSE BILL NO.	
588 PASSED BY	
THE 51ST LEGIS-	
LATURE OF TEX-	
AS.	

Returned and filed for record the ..... day of .....  
....., and recorded the ..... day of .....

ED H. STEGER, County Clerk.  
By ..... Deputy.

How disposed of Gen. Del. Gärden City, Texas.

# EXHIBIT "B"

NO. 11,122

ALICE ROSEMARY	)	IN THE 118TH
RICKER	)	DISTRICT COURT
VS.	)	OF
PRINCE RUPERT	)	HOWARD COUNTY,
RICKER	)	TEXAS

## JUDGMENT

This the 28th day of February, 1958, came on to be heard the above entitled and numbered cause wherein Alice Rosemary Ricker is Plaintiff and Prince Rupert Ricker is Defendant, and the Plaintiff appeared in person and by attorney and Defendant although legally cited to answer herein failed to appear and answer in this behalf; whereupon, a jury being waived and the Court having examined the Plaintiff's petition for divorce and having determined that the same is in due form and contains all of the allegations and information required by law, and having heard the pleadings and evidence, and being of the opinion that the material allegations of such petition are supported by the evidence and are true and that all prerequisites of law have been complied with, and that the Plaintiff is entitled to the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the bonds of matrimony heretofore existing between the Plaintiff, Alice Rosemary Ricker, and the Defendant, Prince Rupert Ricker, are hereby dissolved and the Plaintiff is granted a divorce from the Defendant.

It further appearing to the Court that there were two children born to the Plaintiff and Defendant during their said marriage, to-wit: Princess Ann Ricker, age 2½ years,



and Rosemary Jane Ricker, age one (1) year; and the Court having heard the evidence as to surroundings and circumstances, of such children and the financial circumstances, character and fitness of their parents and their ability to contribute to the support of said children, and being of the opinion that the best interest of the said children will be served if they are given into the custody of Plaintiff; it is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that the care, custody and control of the said children be granted to the Plaintiff, Alice Rosemary Ricker, with reasonable rights of visitation reserved to the Defendant. It is further the ORDER of this Court that Defendant shall have the right of custody and control over Princess Ann Ricker one night each calendar month; and further, at such time as Rosemary Jane Ricker reaches the age of 21½ years, Defendant shall also have the custody and control over her for one night each calendar month.

It is further ORDERED, ADJUDGED AND DECREED by the Court that the above named children of Plaintiff and Defendant shall not be removed from the state of Texas for a period of time in excess of one month in any one year without the consent of the Court being had in advance; it being contemplated that the children might spend one such month out of each year on vacations as to that month no consent of the Court be required.

It is further ORDERED, ADJUDGED AND DECREED by the Court that Prince Rupert Ricker, Defendant, pay to Alice Rosemary Ricker, Plaintiff, on the first day of March, 1958, and on the first day of each succeeding month thereafter, the sum of Fifty Dollars

(\$50.00) for the support of Princess Ann Ricker and Rosemary Jane Ricker and that such payments shall continue until Rosemary Jane Ricker shall have reached the age of eighteen (18) years.

ENTERED this 28th day of February, 1958.

/s/ CHARLIE SEECHER  
Judge Presiding

APPROVED:

/s/ Alice Rosemary Ricker, Plaintiff  
/s/ Prince Rupert Ricker, Defendant

(Jurat omitted in printing)

# EXHIBIT "C"

## AFFIDAVIT

THE STATE OF TEXAS )  
COUNTY OF ECTOR )

BEFORE ME, the undersigned authority, a Notary Public in and for said County, State of Texas, on this day personally appeared THELMA BARHAM, to me well known, and who, after being by me duly sworn, deposes and says as follows:

THAT:

My name is Thelma Barham, and I live at 1605 Fargo, Odessa, Ector County, Texas. My daughter is Alice Rosemary Lawson Ricker Parks, who was married to Prince Rupert Ricker. My daughter and Prince Rupert Ricker were married on September 27, 1954, in Dallas County, Texas. Two children were born of this marriage, being my grandchildren, Princess Ann Ricker Campbell and Rosemary Jane "Gina" Ricker. Prince Rupert Ricker and my daughter, Alice Rosemary Lawson Ricker Parks, were husband and

wife until their divorce on or about February 28, 1958, in Howard County, Texas.

Prince Rupert Ricker is now deceased, he having died on December 22, 1976.

EXECUTED THIS the 23rd day of December, A.D., 1981.

/s/ Thelma Barham

(Jurat omitted in printing)

EXHIBIT "D"

LETTERS OF ADMINISTRATION

(Filed December 28, 1981)

The State of Texas )	No. 486
)	In County Court
County of Reagan )	Reagan County, Texas

I, Hazel S. Carr, Clerk of the County Court of Reagan County, Texas, do hereby certify that on the 3rd day of January, A.D., 1977, Princess Ann Ricker Campbell was by said Court granted Letters of Administration upon the Estate of Prince Ricker deceased, and that on the 10th day of January A.D., 1977, she duly qualified as such as required by law and that said appointment is still in full force and effect.

Given under my hand and seal of said court, at Big Lake, Texas, this 28th day of April A.D. 1977.

Hazel S. Carr, Clerk,  
County Court, Reagan County, Texas.  
By \_\_\_\_\_ Deputy.

(SEAL)

(Caption of District Court omitted in printing)

AFFIDAVIT

(Filed January 8, 1982)

In opposition to the motion of Defendant for summary judgment in the above styled and numbered cause, the undersigned affiant makes this affidavit and hereby on oath states the following:

I am over 21 years of age and am of sound mind, have never been convicted of any crime or offense and have personal knowledge of every statement herein and am fully competent to testify to the matters stated herein.

My name is ANNABEL BARKER. On or about November 24 or November 27, 1957, I was married to PRINCE RUPERT RICKER in Juarez, Mexico. I was not married to any other person at the time of my marriage to PRINCE RUPERT RICKER, and so far as I know or knew at the time of my marriage to PRINCE RUPERT RICKER, the said PRINCE RUPERT RICKER was not married to any one else. After my marriage to PRINCE RUPERT RICKER, I gave birth to his daughter, whose name is now DELYNDY ANN RICKER BARKER REED, and who is the Plaintiff in the above styled and numbered cause. I did not have sexual relations with any man other than PRINCE RUPERT RICKER for at least one year prior to the date of birth of his daughter, the said DELYNDY ANN RICKER BARKER REED. I provided for all of the support of the said daughter of PRINCE RUPERT RICKER prior to the time of his death, in an amount in excess of \$21,000.00, and DELYNDY ANN BARKER REED is entitled to recover of and from the Estate of

PRINCE RUPERT RICKER, Deceased, the sum of at least \$21,000.00 as child support.

/s/ Annabel Barker

(Jurat omitted in printing)

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(Caption of District Court omitted in printing)

PLAINTIFF'S THIRD AMENDED RESPONSE  
TO DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

(Filed March 12, 1982)

In opposition to the motion of Defendant, PRINCESS ANN RICKER CAMPBELL, Individually and as Administratrix of the Estate of PRINCE RICKER, Deceased, for summary judgment in the above styled and numbered cause, Plaintiff, DELYNDIA ANN RICKER BARKER REED, submits this her amended response to such motion.

Plaintiff objects and excepts to Defendant's motion for summary judgment in that it fails to state the specific grounds therefor, as required by Rule 166-A of the Texas Rules of Civil Procedure, and presents Plaintiff without adequate information for opposing the motion.

Plaintiff further objects and excepts to Defendant's motion for summary judgment, and specifically to the affidavit of Thelma Barham filed in support of such motion, in that such supporting affidavit does not purport to be made on personal knowledge and does not affirmatively show that the affiant is competent to testify to the matters stated therein, all as required by Rule 166-A of the Texas Rules of Civil Procedure.

Affidavits of Roger D. Brown and Annabel Barker are attached hereto and made a part hereof for all purposes, and are submitted in opposition to Defendant's motion for summary judgment. Pages 29, 30, 31, 44, and 51 of the deposition of Cinderette McDaniel, pages 8 and 12

of the deposition of Rube Ricker, and pages 16, 17, 18, 19, and 20 of the deposition of Dr. Reginald McDaniel are hereby incorporated herein by reference and made a part hereof for all purposes. Plaintiff would show that the pleadings, together with the attached affidavits and depositions filed herein, show that the following genuine issues as to material facts are in dispute and that the Defendant, the moving party, is not entitled to judgment as a matter of law:

(1) Was there a ceremonial marriage between Annabel Boutwell and Prince Rupert Ricker on or about November 24, 1957, which became valid immediately, or when any impediment to the validity of their marriage was removed by the alleged divorce of Prince Rupert Ricker from Alice Rosemary Ricker on or about February 28, 1958?

(2) Was there an actual or putative marriage between Annabel Boutwell and Prince Rupert Ricker on or about November 24, 1957?

(3) Was there a valid common law marriage between Annabel Boutwell and Prince Rupert Ricker after any alleged divorce of Prince Rupert Ricker from Alice Rosemary Ricker on or about February 28, 1958?

(4) Is the Plaintiff a child of Decedent, PRINCE RUPERT RICKER?

(5) Is the Plaintiff a legitimate child of Decedent, PRINCE RUPERT RICKER?

(6) What amount of child support, if any, is the Plaintiff entitled to from the Estate of PRINCE RUPERT RICKER, Deceased?

(7) Was a suit filed by the Plaintiff, Plaintiff's mother, or any other representative of the Plaintiff, to establish that the Plaintiff was and is the child of PRINCE RUPERT RICKER, Deceased, and what was the date of filing such suit?

(8) Was Plaintiff conceived or born prior to, during, or within a reasonable time after, the ceremonial, common law, or putative marriage of PRINCE RUPERT RICKER and ANNABEL BOUTWELL?

Plaintiff would further show the Court that the motion for summary judgment filed by the Defendant was filed solely for the purpose of delay, and Plaintiff is therefore entitled to a recovery of reasonable attorney fees upon hearing of the Defendant's motion.

WHEREFORE, Plaintiff prays that upon hearing on Defendant's motion for summary judgment, that said motion be in all things denied and that Plaintiff be awarded reasonable attorney fees in connection with these summary judgment proceedings.

/s/Roger D. Brown

Attorney for Plaintiff,  
DELYNDA ANN RICKER  
BARKER REED

(Caption of District Court omitted in printing)

#### AFFIDAVIT

In opposition to the motion of Defendant for summary judgment in the above styled and numbered cause,



the undersigned affiant makes this affidavit and hereby on oath states the following:

I am over 21 years of age and am of sound mind, have never been convicted of any crime or offense and have personal knowledge of every statement herein and am fully competent to testify to the matters stated herein.

My name is ANNABEL BARKER. On or about November 24 or 27, 1957, I was married to PRINCE RUPERT RICKER in Juarez, Mexico. I lived with him as husband and wife from November 24 or 27, 1957, to August, 1958. I was not married to any other person at the time of my marriage to PRINCE RUPERT RICKER, and so far as I know or knew at the time of my marriage to PRINCE RUPERT RICKER, the said PRINCE RUPERT RICKER was not married to any one else. During my marriage to PRINCE RUPERT RICKER, I gave birth to his daughter on November 1, 1958, whose name is now DELYNDIA ANN RICKER BARKER REED, and who is the Plaintiff in the above styled and numbered cause. I did not have sexual relations with any man other than PRINCE RUPERT RICKER for at least one year prior to the date of birth of his daughter, the said DELYNDIA ANN RICKER BARKER REED. I provided for all of the support of the said daughter of PRINCE RUPERT RICKER prior to the time of his death, in an amount in excess of \$21,000.00, and DELYNDIA ANN RICKER BARKER REED is entitled to recover of and from the Estate of PRINCE RUPERT RICKER, Deceased, the sum of at least \$21,000.00 as child support.

/s/ Annabel Barker

(Jurat omitted in printing)

(Caption of District Court omitted in printing)

### AFFIDAVIT

In opposition to the motion of Defendant for summary judgment in the above styled and numbered cause, the undersigned affiant makes this affidavit and hereby on oath states the following:

I am over 21 years of age and am of sound mind, have never been convicted of any crime or offense and have personal knowledge of every statement herein and am fully competent to testify to the matters stated herein.

My name is ROGER D. BROWN, and I am the attorney for the Plaintiff in the above styled and numbered cause, DELYNDIA ANN RICKER BARKER REED. On or about February 16, 1978, in Cause No. 486, in the County Court of Reagan County, Texas, I filed, on behalf of the Plaintiff, DELYNDIA ANN RICKER BARKER REED, a claim against the Estate of PRINCE RUPERT RICKER, Deceased, in which the said Plaintiff claimed to be the minor child of the said Decedent, praying for child support in the amount of \$21,000.00. On or about July 15, 1978, I filed, on behalf of the Plaintiff, DELYNDIA ANN RICKER BARKER REED, an original petition in the 83rd Judicial District Court of Reagan County, Texas, in Cause No. 2567, in which DELYNDIA ANN RICKER BARKER REED claims to be the minor child of PRINCE RUPERT RICKER, Deceased, as a result of a marriage between the said Decedent and ANNABEL BARKER, which marriage is alleged to have taken place in Juarez, Mexico, on or about November 24 or 27, 1957. The above two suits were subsequently consolidated, because, as recognized in Para-

graph 4 of Defendant's motion for summary judgment, "Both pending actions involve the same parties and both of said suits sought to establish the Plaintiff as a lawful heir to the Estate of PRINCE RUPERT RICKER, Deceased, and Plaintiff's respective claims against an interest in and to said Estate, being certain mineral interests in lands." The pleadings in the suits filed by me, and the order of consolidation, all referred to above, are among the Court's file in this cause, and are hereby referred to and incorporated herein.

/s/ Roger D. Brown  
(Jurat omitted in printing)

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(Caption of District Court omitted in printing)

AMENDED

APPLICATION TO DETERMINE HEIRSHIP

(Filed September 7, 1982)

TO THE HONORABLE JUDGE OF SAID COURT:

DELYNDA ANN RICKER BARKER REED, Petitioner herein, is a resident of Big Spring, Howard County, Texas, and is a surviving daughter of PRINCE RICKER, Deceased, who died intestate on December 22, 1976, in Kerr County, Texas.

The names and residences of decedent's heirs, all of whom are named herein as Petitioner or Respondents, are:

Princess Ann Ricker Campbell	1203 Mimosa, Odessa, Texas, 79760
Rosemary Jane Ricker	Residence Unknown
Prince Ricker, Jr.	Residence Unknown
Brett Drayton Ricker	Residence Unknown
Mark Ricker	Residence Unknown
Delynda Ann Ricker Barker Reed	Sterling City, Rt., Box 1603, Big Spring, Texas 79720

Petitioner is the natural and legitimate child of PRINCE RICKER. On or about the 24th or 27th day of November, 1957, Petitioner's mother, now ANNABEL BARKER, was ceremonially married to Prince Ricker in Juarez, Mexico, at which time the said PRINCE RICKER and Petitioner's mother agreed to then and thereafter be husband and wife. After such marriage, the said PRINCE RICKER and ANNABEL BARKER established residence at 200 North Goliad Street, in Big Spring,

Howard County, Texas, and lived together as husband and wife, had sexual relations together as husband and wife, and held themselves out to the public as husband and wife until June, 1958, at which time they separated. At the time of such separation, ANNABEL BARKER was pregnant with Petitioner as a result of her sexual relationship with PRINCE RICKER after the date of her ceremonial marriage to PRINCE RICKER. For a period of at least one year prior to the date of birth of Petitioner, which occurred on the 1st day of November, 1958, ANNABEL BARKER had no sexual relations with anyone other than PRINCE RICKER.

At the time of the ceremonial marriage between PRINCE RICKER and ANNABEL BARKER, ANNABEL BARKER was aware that PRINCE RICKER had been previously married to another woman, but had been assured by PRINCE RICKER that such earlier marriage had been terminated by divorce. At the time of the ceremonial marriage, and thereafter while they lived together and held themselves out to the public as husband and wife, Petitioner's mother believed in good faith that she was legally married to PRINCE RICKER and that there was no impediment to such marriage. Such good faith belief on the part of Petitioner's mother continued on until some time after the date of separation of PRINCE RICKER and ANNABEL BARKER. Many years after such separation, and after this suit was filed, Petitioner's mother was advised that PRINCE RICKER had not been divorced from Alice Rosemary Ricker until on or about February 28, 1958.

If Petitioner is mistaken in her belief that the ceremonial marriage between her mother and PRINCE RICKER was a valid marriage upon the date of such marriage,

because of the unterminated marriage of PRINCE RICKER to Alice Rosemary Ricker, then Petitioner would show that the ceremonial marriage became a valid marriage when the legal impediment to such ceremonial marriage was removed by the divorce of PRINCE RICKER from Alice Rosemary Ricker on or about February 28, 1958.

In the alternative, if the ceremonial marriage was not a valid marriage for any reason, the common law marriage between Petitioner's mother and PRINCE RICKER which resulted from their agreement to be husband and wife, their living together in a conjugal relationship as husband and wife, and their holding themselves out to the public as husband and wife, became a valid common law marriage on and after February 28, 1958, the date of the divorce of PRINCE RICKER from Alice Rosemary Ricker.

In the event that either or both the ceremonial marriage or the common law marriage between Petitioner's mother and PRINCE RICKER were invalid, Petitioner would show that she is still the legitimate child of PRINCE RICKER and entitled to inherit from him, as the child of a putative marriage, because her mother entered into a marriage relationship with PRINCE RICKER, either ceremonial or common law, in good faith, believing PRINCE RICKER to be unmarried, and subsequently had a child by him. Petitioner is therefore a legitimate child of PRINCE RICKER and entitled to inherit from him as such, under the laws of the State of Texas.

On the date of Decedent's death, he owned the following described real and personal property:

- (1) A 2,880 acre ranch, legally described as Sections 37 and 46, Block "A", L&SV Ry. Co. Survey;



and the E/2 of Section 7, all of Section 5, and all of Section 6, Block "O", GC&SF Ry. Co. Survey; all in Reagan County, Texas

and other real properties, the extent, nature, and location of which are unknown to Petitioner;

(2) Mortgages, notes, and cash totaling \$52,136.00, and other personal properties, the extent, nature, and location of which are unknown to Petitioner.

Petitioner herein owns an interest in and to all of the above described estate, and Petitioner and Respondents named herein are the sole and only heirs of said Decedent.

The true and correct shares of Petitioner and of each of the heirs named as Respondents herein in the estate of the Decedent are as follows:

Princess Ann Ricker Campbell	1/6th
Rosemary Jane Ricker	1/6th
Prince Ricker, Jr.	1/6th
Brett Drayton Ricker	1/6th
Mark Ricker	1/6th
Delynda Ann Ricker Barker Reed	1/6th

WHEREFORE, Petitioner prays that on final hearing hereof, this court determine, declare, and adjudge who are the heirs and only heirs of the Decedent, PRINCE RICKER; that the Court in particular, determine, declare, and adjudge that Petitioner has a 1/6th interest in

and to the estate of the Decedent; and for such other relief to which she may be entitled.

/s/ DELYND A ANN RICKER  
BARKER REED

PETITIONER

ROGER D. BROWN, P.C.  
P. O. Box 672  
Big Spring, Texas 79720

/s/ Roger D. Brown,  
Bar Card #031-66000

ATTORNEY FOR PETITIONER

(Jurat omitted in printing)

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(Caption of District Court omitted in printing)

MOTION FOR NON-SUIT

(Filed September 7, 1982)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, DELYNDA ANN RICKER BARKER REED, the Petitioner in the above entitled and numbered cause, and respectfully moves the Court to enter its Order of Non-Suit for the portion of Petitioner's lawsuit filed as a Claim in the Probate Court of Reagan County, Texas, for child support, which Claim was denied, and the Petitioner appealed by filing her Petition based upon said Claim in the District Court of Reagan County, Texas, appealing such denial. Copies of the Claim filed in Probate Court and the Petition filed in District Court are attached hereto and marked Exhibits "A" and "B" respectively.

Respectfully submitted,

ROGER D. BROWN, P.C.

P.O. Box 672

Big Spring, Texas 79720

/s/ Roger D. Brown  
Bar Card #031-66000

ATTORNEY FOR PETITIONER

ORDER OF NON-SUIT

On this the 13th day of September, 1982, came on to be considered by the Court the foregoing Motion for Non-Suit filed by Plaintiff, and the Court therefore grants same.

IT IS THEREFORE, ORDERED by the Court that the portion of Petitioner's lawsuit filed as a Claim in the Probate Court of Reagan County, Texas, for child sup-

port, which Claim was denied (and the Petitioner appealed by filing her Petition based upon said Claim in the District Court of Reagan County, Texas, appealing such denial), be and it is hereby dismissed without prejudice to the Petitioner to pursue her cause of action elsewhere. All costs in this connection are taxed against the Petitioner.

/s/ William H. Earney  
Judge Presiding

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(Caption of District Court omitted in printing)

## CHARGE OF THE COURT

(Filed September 17, 1982)

### MEMBERS OF THE JURY:

This case is submitted to you on Special Issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

Do not let bias, prejudice or sympathy play any part in your deliberations.

In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this Courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

Since every answer that is required by the Charge is important, no Juror should state or consider that any required answer is not important.

You must not decide who you think should win, and then try to answer the questions accordingly. Simply

answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

You will not decide an issue by lot or drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the Jurors agree to abide by the result to be reached by adding together each Juror's figures and dividing by the number of Jurors to get an average. Do not do any trading on your answers; that is, one Juror should not agree to answer a certain question one way if others will agree to answer another question another way.

You may render your verdict upon the vote of ten or more members of the Jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten Jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the Foreman shall sign the verdict for the entire Jury. If any Juror disagrees as to any answer made by the verdict, those Jurors who agree to all findings shall each sign the verdict.

Hold yourselves apart from the lawyers, the witnesses, and the parties to the suit. They are compelled to hold themselves apart from you, and they understand your aloofness.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will

be Jury misconduct and it may require another trial by another Jury; then all of our time will have been wasted.

The Foreman or any other Juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the Juror not to do so again.

When words are used in Special Issues in a sense which varies from the meaning commonly understood, you will be given in this Charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

The Special Issues usually begin with the phrase "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. "Preponderance of the Evidence" means the greater weight and degree of credible testimony or evidence before you and admitted in evidence in this case.

You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. The Court has no right by any word or act to indicate any opinion respecting any matter of fact involved in this case, nor to indicate any desire respecting its outcome. The Court has not intended to express any opinion upon any matter of fact in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

You are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony.

You are instructed that in this case parties to this suit are not permitted by the law to give evidence relating to any transaction or conversation with, or statement by, Prince Rupert Ricker, deceased, unless the said parties are called to testify by the opposite party.

### DEFINITIONS

- (1) By "an agreement to be husband and wife" is meant that the parties have a present intention to assume that relation.
- (2) By "living together as husband and wife" as that term is used in this Charge, is meant living together in the relationship of husband and wife.

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### SPECIAL ISSUE NO. 1

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT DELYNDA ANN RICKER BARKER REED IS THE CHILD OF PRINCE RUPERT RICKER?

ANSWER "YES" OR "NO".

ANSWER: YES.

(Eleven Jury Signatures omitted in printing)

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### SPECIAL ISSUE NO. 2

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT ANNABEL BOUTWELL AND PRINCE RUPERT RICKER ENTERED INTO A CEREMONIAL MARRIAGE ON OR ABOUT THE 24TH OR 27TH DAY OF NOVEMBER, 1957?



ANSWER "YES" OR "NO".

ANSWER: YES.

(Eleven Jury Signatures omitted in printing)

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SPECIAL ISSUE NO. 3

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT ON OR ABOUT THE 24TH OR 27TH DAY OF NOVEMBER, 1957, ANNABEL BOUTWELL AND PRINCE RUPERT RICKER AGREED THAT THEY WOULD BE HUSBAND AND WIFE?

ANSWER "YES" OR "NO".

ANSWER: YES.

(Eleven Jury Signatures omitted in printing)

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SPECIAL ISSUE NO. 4

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT ON OR AFTER THE 24TH OR 27TH DAY OF NOVEMBER, 1957, ANNABEL BOUTWELL AND PRINCE RUPERT RICKER LIVED TOGETHER AS HUSBAND AND WIFE UNTIL JUNE, 1958?

ANSWER "YES" OR "NO".

ANSWER: NO.

(One Jury Signature omitted in printing)

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SPECIAL ISSUE NO. 5

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT AFTER THE 24TH OR 27TH DAY OF NOVEMBER, 1957, ANNABEL BOUTWELL AND PRINCE RUPERT RICKER HELD THEMSELVES OUT TO THE PUBLIC AS HUSBAND AND WIFE UNTIL JUNE, 1958?

ANSWER "YES" OR "NO".

ANSWER: NO.

(Eleven Jury Signatures omitted in printing)

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SPECIAL ISSUE NO. 6

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT ON NOVEMBER 24TH OR 27TH, 1957, ANNABEL BOUTWELL BELIEVED PRINCE RUPERT RICKER TO BE UNMARRIED?

ANSWER: "SHE BELIEVED HE WAS UNMARRIED" OR "SHE BELIEVED HE WAS MARRIED".

ANSWER: SHE BELIEVED HE WAS MARRIED.

(One Jury Signature omitted in printing)

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After you retire to the Juryroom, you will select your own Foreman. The first thing the Foreman will do is to have the complete Charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the Foreman:

To preside during your deliberations;

To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this Charge;

To write out and hand to the Bailiff any communication concerning the case which you desire to have delivered to the Judge;

To vote on the issues;

To write your answers to the issues in the spaces provided; and,

To certify to your verdict in the space provided for the Foreman's signature, or to have the same signed by those members of the Jury agreeing to such verdict, if less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the Bailiff or this Court. You should not discuss the case with anyone, not even other members of the Jury, unless all of you are present and assembled in the Juryroom. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the Courthouse, at your home or elsewhere, please inform the Judge of this fact.

When you have answered all of the foregoing Special Issues which you are required to answer under the instructions of the Judge, and your Foreman has placed your answers in the spaces provided, and the verdict has been signed in accordance with these instructions, you will advise the Bailiff at the door of the Juryroom that you

have reached a verdict, and then you will return into Court with your verdict.

/s/ William H. Earney  
Judge Presiding

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CERTIFICATE

(Filed September 17, 1982)

We, the Jury, have answered the above and foregoing Special Issues as herein indicated, and herewith return same into Court as our verdict.

/s/ Robert J. Moore  
Foreman

(Eleven additional Jury Signatures omitted in printing)

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[Questions from the jury and judge's response]

If we answered Yes to Issue #1, Does Issue 2, 3, 4, 5 & 6 be answered Yes?

Foreman  
Jim Moore

William H. Earney Judge  
1:40 PM

I can only offer you to the Charge as given and you should answer *each* question according to the evidence and not according to how you answer any other question.

---

Do we have to answer Yes or No to all questions?

You are to answer all the questions with one or the other of the listed answers. The foreman should sign this note.

William H. Earney Judge  
1:25 P.M.

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(Caption of District Court omitted in printing)  
 MOTION FOR JUDGMENT ON THE VERDICT  
 (Filed September 27, 1982)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Defendant, PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PRINCE RICKER, DECEASED, in the above entitled and numbered cause, and files this its Motion for Judgment on the Verdict, showing the Court that the findings of the Jury, in response to Special Issues submitted to them, entitle this Defendant to Judgment against the Plaintiff, DELYNDIA ANN RICKER BARKER REED, and that it be decreed by the Court that Plaintiff take nothing by her suit and that Defendant go hence with its costs.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court make the findings in its behalf and render such Judgment in its behalf.

RESPECTFULLY SUBMITTED,  
 SHAFER, GILLILAND, DAVIS,  
 McCOLLUM & ASHLEY, INC.  
 P.O. Drawer 1552  
 Odessa, Texas 79760  
 (915/332-0893)

By: /s/ Paul McCollum  
 State Bar No. 13436000

ATTORNEYS FOR THE  
 DEFENDANT

(Certificate of Service omitted in printing)

(Caption of District Court omitted in printing)  
 MOTION FOR JUDGMENT ON THE VERDICT,  
 AND TO DISREGARD ANSWERS OF JURY TO  
 CERTAIN SPECIAL ISSUES, AND  
 ALTERNATIVELY, FOR JUDGMENT  
 NON OBSTANTE VERDICTO

(Filed October 19, 1982)

TO THE HONORABLE JUDGE OF SAID COURT:

Delynda Ann Ricker Barker Reed, Plaintiff in the above-entitled cause, moves the Court to enter judgment in favor of Plaintiff on the findings of the jury in response to Special Issue Number 1; to disregard the findings of the jury on Special Issues Number 4 and 5; to harmonize the answer to Special Issue Number 6 with the answers to Special Issues Number 1, 2, and 3, and with Special Issues Number 4 and 5 since living together and holding themselves out to the public as husband and wife was established by all the evidence; and in the alternative for Judgment Non Obstante Verdicto, and as grounds therefore would respectfully show:

I.

Heretofore in the trial of this cause the Court submitted the case to the jury upon special issues, and the jury returned their findings upon such special issues, which findings were received by the Court and filed and entered on the minutes of the Court. The issues submitted to the jury and the findings thereon are as follows:



*Special Issue Number 1:*

"Do you find from a preponderance of the evidence that Delynda Ann Ricker Barker Reed is the child of Prince Rupert Ricker?" Jury's answer: "YES."

*Special Issue Number 2:*

"Do you find from a preponderance of the evidence that Annabel Boutwell and Prince Rupert Ricker entered into a ceremonial marriage on or about the 24th or 27th day of November, 1957?" Jury's answer: "YES."

*Special Issue Number 3:*

"Do you find from a preponderance of the evidence that on or about the 24th or 27th day of November, 1957, Annabel Boutwell and Prince Rupert Ricker agreed that they would be husband and wife?" Jury's answer: "YES."

*Special Issue Number 4:*

"Do you find from a preponderance of the evidence that on or after the 24th or 27th day of November, 1957, Annabel Boutwell and Prince Rupert Ricker lived together as husband and wife until June, 1958?" Jury's answer: "NO."

*Special Issue Number 5:*

"Do you find from a preponderance of the evidence that after the 24th or 27th day November, 1957, Annabel Boutwell and Prince Rupert Ricker held themselves out to the public as husband and wife until June, 1958?" Jury's answer: "NO."

*Special Issue Number 6:*

"Do you find from a preponderance of the evidence that on November 24 or 27, 1957, Annabel Boutwell believed Prince Rupert Ricker to be unmarried?" Jury's answer: "SHE BELIEVED HE WAS MARRIED."

## II.

The jury's answer of "YES" to Special Issue Number 1 is supported by a preponderance of the evidence and entitles the Plaintiff to Judgment regardless of her status as legitimate or illegitimate. In this connection, Special Issues Number 2, 3, 4, 5, and 6, are immaterial. Plaintiff has been adjudicated the child of Prince Rupert Ricker, deceased, and is entitled to judgment regardless of her status as legitimate or illegitimate. Inquiry as to marriage between Annabel Boutwell and Prince Rupert Ricker is therefore immaterial.

## III.

The jury's answer of "YES" to Special Issues Number 2 and 3 of the Court's charge is supported by a preponderance of the evidence and entitle Plaintiff to judgment as the legitimate child of Prince Rupert Ricker.

## IV.

Special Issues Number 4, 5, and 6 are immaterial in that there occurred a ceremonial marriage accompanied by an agreement to be married. Plaintiff is entitled to inherit as the legitimate child of Prince Rupert Ricker so inquiry as to whether a common-law or putative marriage occurred between Annabel Boutwell and Prince Rupert Ricker is immaterial.

## V.

WHEREFORE, this Plaintiff requests that notice of this motion be given as required by law, that on hearing of the same the findings of the jury in answer to Special Issues Number 4, 5 and 6 or Special Issues Number 3, 4, 5

and 6 be disregarded, that judgment be entered for this Plaintiff upon the remaining findings of the jury, and that such other and further relief be granted, at law or in equity, as to which this movant may by this motion or proper amendment thereto show herself justly entitled.

#### MOTION TO DISREGARD ANSWERS OF JURY TO CERTAIN SPECIAL ISSUES

In the alternative, Delynda Ann Ricker Barker Reed, Plaintiff, in the above-entitled cause, moves the Court to disregard the findings of the jury on Special Issues Number 4, 5, and 6, and to enter judgment for this Plaintiff upon the remaining findings of the jury, and in support thereof shows the Court the following:

#### VI.

The jury's finding in response to Special Issue Number 4 should be disregarded because the evidence proves conclusively that Annabel Boutwell and Prince Rupert Ricker lived together as husband and wife and Special Issue Number 4 should not have been submitted to the jury.

#### VII.

Special Issue Number 4 is immaterial in that Plaintiff's entitlement to judgment was not governed by her legitimacy and therefore inquiry as to whether a marriage occurred between Annabel Boutwell and Prince Rupert Ricker is immaterial.

#### VIII.

The jury's finding in response to Special Issue Number 5 should be disregarded because the evidence proves

conclusively that Annabel Boutwell and Prince Rupert Ricker held themselves out to the public as husband and wife and Special Issue Number 5 should not have been submitted to the jury.

#### IX.

Special Issue Number 5 is immaterial in that Plaintiff's entitlement to judgment was not governed by her legitimacy and therefore inquiry as to whether a marriage occurred between Annabel Boutwell and Prince Rupert Ricker is immaterial.

#### X.

The jury's finding in response to Special Issue Number 6 can be harmonized with Special Issues Numbers 2 and 3 in that one November 24 or 27, 1957, Annabel Boutwell believed that Prince Rupert Ricker was married to her, rather than someone else.

#### XI.

Special Issue Number 6 is immaterial in that Plaintiff's entitlement to judgment was not governed by her legitimacy and therefore inquiry as to whether a marriage occurred between Annabel Boutwell and Prince Rupert Ricker is immaterial.

WHEREFORE, this Plaintiff requests that notice of this motion be given as required by law, that on hearing of the same the findings of the jury and answer to Special Issues Number 4, 5, and 6 be disregarded, that judgment be entered for this Plaintiff upon the remaining findings of the jury, and that such other and further relief be granted, at law or in equity, as to which this movement

made by this motion or proper amendment thereto show herself justly entitled.

MOTION FOR JUDGMENT NON OBSTANTE  
VERDICTO AND TO DISREGARD ANSWERS OF  
JURY TO CERTAIN SPECIAL ISSUES

In the alternative, Delynda Ann Ricker Barker Reed, Plaintiff, in the above-entitled cause, moves the Court for Judgment Non Obstante Verdicto, and as grounds therefore shows:

XII.

The Court submitted this case to the jury upon special issues, and the jury returned their findings upon such special issues which findings were received by the Court, and filed and entered on the minutes of this Court. The issues submitted to the jury and findings thereon are incorporated herein as if fully set forth at length. The Court erred in submitting the case to the jury, because no material issue of fact was raised by the evidence and a directed verdict for Plaintiff would have been proper for the reasons set forth specifically in the following paragraphs.

XIII.

The Court should enter judgment for Plaintiff notwithstanding the verdict for the reasons that the evidence proves conclusively that Delynda Ann Ricker Barker Reed was the child of Prince Rupert Ricker; the evidence proved conclusively that Annabel Boutwell and Prince Rupert Ricker entered into a ceremonial marriage; the evidence proved conclusively that Annabel Boutwell and Prince Rupert Ricker agreed that they would be husband and

wife; the evidence proved conclusively Annabel Boutwell and Prince Rupert Ricker lived together as husband and wife; the evidence proved conclusively Annabel Boutwell and Prince Rupert Ricker held themselves out to the public as husband and wife; and the evidence proved conclusively that Annabel Boutwell believed Prince Rupert to be married to herself on November 24 or 27, 1957.

XIV.

The Court should enter judgment for the Plaintiff for the reason that once Plaintiff was established as the child of Prince Rupert Ricker, she was entitled to judgment regardless of her status as legitimate or illegitimate and therefore inquiry as to whether a marriage occurred between Annabel Boutwell and Prince Rupert Ricker is immaterial. Therefore, a directed verdict for the Plaintiff would have been proper.

WHEREFORE, Plaintiff requests that the Court disregard the above jury findings and enter a judgment non obstante verdicto for this Plaintiff, and for such other and further relief, at law or in equity, as to which this movant made by this motion or proper amendment thereto show herself justly entitled.

Respectfully submitted,

BANCROFT, MOULTON & MITCHEL

By: /s/ Ben Bancroft  
Attorney for Plaintiff

(Unexecuted Orders omitted in printing)

(Certificate of Delivery omitted in printing)

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(Caption of District Court omitted in printing)

DEFENDANT'S RESPONSE TO PLAINTIFF'S  
MOTION FOR JUDGMENT ON THE VERDICT,  
AND TO DISREGARD ANSWERS OF JURY TO  
CERTAIN SPECIAL ISSUES, AND ALTERNATELY,  
FOR JUDGMENT NON OBSTANTE VERDICTO

(Filed November 1, 1982)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PRINCE RUPERT RICKER, DECEASED, and files this its Response to Plaintiff's Motion for Judgment on the Verdict, and to Disregard Answers of Jury to Certain Special Issues, and Alternatively, for Judgment Non Obstante Verdicto, and would respectfully show to the Court as follows:

In response to Plaintiff's Motion for Judgment on the Verdict, set out in Paragraphs I through V of Plaintiff's Motion, Defendant would respectfully respond as follows:

I.

Plaintiff, in Paragraph II of her Motion for Judgment on the Verdict and to Disregard Answers of Jury to Certain Special Issues, and Alternatively for Judgment Non Obstante Verdicto, seeks to have the Court enter Judgment on the Jury's finding to Special Issue Number 1, in which the Jury found Plaintiff to be the child of Prince Rupert Ricker, and seeks to have the Court disregard the other Special Issues, which are Special Issues Numbers 2, 3, 4, 5 and 6. Plaintiff says that the Jury's findings to Special Issues Numbers 2, 3, 4, 5 and 6 are

superfluous and entitled Plaintiff to a Judgment in her favor as a matter of law.

Defendant says that an affirmative finding for Plaintiff on Special Issue Number 1 alone in no way entitles Plaintiff to Judgment. The sole finding that Plaintiff was the child of Prince Rupert Ricker in no way determines the issue of whether Plaintiff was the legitimate or illegitimate child of Prince Rupert Ricker. The evidence adduced upon the trial hereof and in the certified copies of the marriage license of Prince Rupert Ricker and Alice Rosemary Lawson, evidencing their marriage in Dallas County on September 24, 1954, and their subsequent divorce in Midland County on February 28, 1958, introduced into evidence at the trial and attached to Defendant's Motion for Summary Judgment as Exhibits "A" and "B" respectively, show without contradiction that Prince Rupert Ricker was already lawfully married to Alice Rosemary Lawson at the time of the purported marriage of Prince Rupert Ricker and Annabel Boutwell on or about the 24th or 27th day of November, 1957, in Juarez, Mexico. Hence, Plaintiff could not be the legitimate child of Prince Rupert Ricker and Plaintiff's mother. A determination must be made as to the legitimacy of Plaintiff before Plaintiff can be entitled to Judgment. As a matter of law, the marriage of Prince Rupert Ricker and Annabel Boutwell was void. *Section 2.22, Texas Family Code, V.A.C.S.*

The finding by the Jury to Special Issue Number 1, that Plaintiff was the child of Prince Rupert Ricker, merely establishes Plaintiff as the illegitimate child of Prince Rupert Ricker. Under the recent decision of *Winn v.*



Lackey, 618 S.W.2d 910 (Tex. Civ.App.—Eastland 1981, ref'd n.r.e.), which is fully set out and explained in Defendant's Brief in Support of Defendant's Motion for Summary Judgment, and to which reference is hereby made, Plaintiff is not entitled to Judgment as a matter of law. Defendant says that Plaintiff's argument as set out in Paragraph II is erroneous and Plaintiff is not entitled to Judgment as a matter of law.

## II.

Defendant further states that the Plaintiff is erroneous in her reasoning in Paragraphs III and IV of her motion, which urges that the Jury's answers to Special Issues Numbers 2 and 3 establish Plaintiff as the legitimate child of Prince Rupert Ricker, and therefore, the Jury's findings to Special Issues Numbers 4, 5, and 6 are immaterial and there is no need for inquiry as to whether a common-law or putative marriage existed between Annabel Boutwell and Prince Rupert Ricker.

This argument is patently fallacious for the reason that at the time of the ceremonial marriage between Annabel Boutwell and Prince Rupert Ricker on or about the 24th or 27th day of November, 1957, Prince Rupert Ricker was already lawfully married to Rosemary Jane Lawson, hence his marriage to Annabel Boutwell was void as a matter of law. *Section 2.22, Texas Family Code, V.A.C.S.* Even if the Jury's answers to Special Issues Numbers 4, 5 and 6 were disregarded by the Court, which is not urged by this Defendant, the effect of the Jury's answers to the remaining Special Issues Numbers 1, 2 and 3 would be to find Plaintiff the child of a void marriage between Anna-

bel Boutwell and Prince Rupert Ricker. Hence, Plaintiff would be the illegitimate child of Prince Rupert Ricker as a matter of law and would not be entitled to inherit from the estate of Prince Rupert Ricker under the authority of *Winn v. Lackey*, as a matter of law.

## III.

Defendant would further state that after the Plaintiff and Defendant rested and closed in the trial hereon, and before submission of the Court's Charge to the Jury, both the Plaintiff and Defendant had the opportunity to make their respective objections to the Charge of the Court. No objection to the giving of any of the Special Issues was made by Plaintiff at that appropriate time, and Defendant says that it is now too late for Plaintiff to object to the giving of any of the Special Issues. Defendant states that all of the Special Issues are in conformity with each other, they present no conflict, and Defendant urges the Court to grant a take nothing Judgment in favor of this Defendant in conformity with the Jury's findings to the Special Issues.

WHEREFORE, Defendant prays the Court enter Judgment for Defendant in conformity with the Jury's answers to the Special Issues given by the Court and that Defendant be discharged with its costs.

\* \* \*

In response to Plaintiff's Paragraphs VI, VII, VIII, IX, X and XI, wherein Plaintiff urges the Court to disregard the Jury's answers to Special Issues Numbers 4, 5 and 6, Defendant would respectfully show to the Court.

in continuation with its Response to Plaintiff's Motion, the following, to-wit:

#### IV.

Defendant states that there is ample support in the evidence adduced at trial to support the Jury's answers to Special Issues Numbers 4, 5 and 6.

In this lawsuit, it is incumbent upon Plaintiff to prove by a preponderance of the evidence that Plaintiff is the legitimate child of Prince Rupert Ricker in order for Plaintiff to inherit from the estate of Prince Rupert Ricker. *Winn v. Lackey*, cited supra. Because Prince Rupert Ricker was lawfully married to Rosemary Jane Lawson at the time of the Mexican ceremonial marriage of November 24 or 27, 1957, to Annabel Boutwell, it is necessary for Plaintiff to establish Plaintiff as the legitimate child of Prince Ricker. The only way that Plaintiff can do this is by proving by a preponderance of the evidence the existence of a common-law or putative marriage arising upon the dissolution of the marriage of Prince Rupert Ricker and Rosemary Jane Lawson, which marriage was dissolved by divorce in Midland County on February 28, 1958.

It was Plaintiff that requested Special Issues inquiring of the Jury of a present agreement by Prince Rupert Ricker and Annabel Boutwell to be married; of their living together as husband and wife on and after November 24 or 27, 1957; and of whether Annabel Boutwell believed Prince Rupert Ricker to be unmarried on or about November 24 or 27, 1957. These Special Issues were requested by the Plaintiff and were given by the Court. At no time prior to the submission to the Jury of the Court's Charge did Plaintiff's object to the giving of these Special Issues.

Failure to object and point out distinctly the matter to which a party objects and the grounds for such objection to any Special Issue before submission to the Jury shall cause any objection thereto to be waived. *Rules 272 and 274, Texas Rules of Civil Procedure, V.A.C.S.*

Further, Defendant says that there was ample evidence adduced upon the trial to support the giving of these Special Issues Numbers 4, 5 and 6. Without the benefit of a Statement of Facts, Defendant states the following testimony was elicited from various witnesses, which raise a fact issue, as follows:

Annabel Boutwell, Plaintiff's mother, herself admitted that she knew Prince Rupert Ricker was married when she began dating him in late August, 1957, when he was living in Stanton, Texas at the Stanton Hotel. She further admitted he kept his room at the Stanton Hotel after their "marriage" and she "lived" with him on the weekends. She further admitted that she did not know if Prince Ricker was divorced, and in late August, 1957, she knew they were still married. She admitted she took no steps to ascertain whether or not Prince Ricker and Alice Rosemary Lawson were divorced. She further admitted that he kept some things at her house and he kept some things at his room at the Stanton Hotel.

Ms. Juanita Tucker, Annabel Boutwell's maid, testified she sometimes did Prince Ricker's laundry, but did not work on the weekends, and did not actually see him living there.

Ms. Rube Ricker, Prince Ricker's mother, testified by deposition that when Annabel Boutwell showed her the Plaintiff as a small child and told Ms. Ricker that the child was Prince Rupert Ricker's child, Ms. Ricker responded by stating that it was Annabel Boutwell's word against that of her son, Prince. She further testified that she did not engage in public gossip or speculation.

Marilyn Watts, who married Prince Ricker on April 4, 1960, and was married to Prince Ricker for seven (7) years, testified that she and Prince Ricker talked about Annabel Boutwell, and Prince Ricker told her he never married Annabel Boutwell.

Rosemary Lawson Ricker Ming testified that even after she filed for a divorce of her marriage to Prince Rupert Ricker on or about November 22, 1957, she and Prince lived together from time to time and spent some weekends at the Stanton Hotel. She further testified that she knew Annabel Boutwell and talked to her after Plaintiff was born, when Annabel asked her to help support her and the Plaintiff. At no time during any of these conversations did Annabel Boutwell purport to have ever been married to Prince Ricker.

J. M. Yater, a teacher in the public school system where Prince Ricker taught from the school year 1957 to 1958 testified that he never heard Prince Ricker mention that he was married and further testified that he was under the impression that Prince Ricker was unmarried. He further never remembered Prince Ricker bringing a wife or girlfriend to any of the school functions.

Cindrete McDaniel, Prince Ricker's sister, filed an Heirship Affidavit in the Deed Records of Reagan County, Texas, swearing that Prince Ricker was married three (3) times during his lifetime; to Rosemary Lawson, to Jeri Laverne, and to Marilyn Salt. No mention is made of Annabel Boutwell in this affidavit. Further, a certified copy of the divorce decree of Prince Ricker and Jeri Laverne was admitted into evidence showing Prince Ricker and Jeri Laverne were married October 20, 1958, and subsequently divorced January 4, 1960 in Midland County, Texas.

Defendant states that all of this evidence is sufficient to establish fact issues for the sole determination by the Jury, and that the giving of Special Issues Numbers 3, 4, 5 and 6 by the Court was proper. Defendant says that Plaintiff should be held bound by the answers of the Jury.

WHEREFORE, Defendant prays that the Court enter Judgment for Defendant in conformity with the Jury's answers to the Special Issues given by the Court and that Defendant be discharged with its costs.

\* \* \*

In response to Plaintiff's Motion for Judgment Non Obstante Verdicto, Plaintiff's Paragraphs XII, XIII and XIV, Defendant would respectfully show to the Court, in continuation with its Response to Plaintiff's Motion the following, to-wit:

V.

Rule 301 of the Texas Rules of Civil Procedure states in pertinent part as follows:



“Provided, that upon motion and reasonable notice the court may render judgment non obstante verdicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence.”

Defendant says that Judgment Non Obstante Verdicto is improper under the facts of this case. There is ample evidence in the records to support the fact issues upon which all of the Special Issues are based, some of that evidence being stated above by Defendant in this motion. The Plaintiff should be therefore bound by the Jury's answers to the Special Issues, and this Defendant hereby refers to the arguments set out above as supporting the Jury's answers to the Special Issues given in the Court's Charge.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court deny all of Plaintiff's motions contained in its Motion for Judgment on the Verdict, and to Disregard Answers of Jury to Certain Special Issues, and Alternatively, for Judgment Non Obstante Verdicto, for the reasons mentioned above, and Defendant further prays that the Court sign a final Judgment in this Cause for Defendant, ordering Plaintiff take nothing by her suit, and discharging this Defendant with its costs.

\* \* \*

In further support of its position that this Defendant should be granted a take nothing judgment in its favor, Defendant would urge the following:

## VI.

Defendant states that Plaintiff's suit against the Estate of Prince Rupert Ricker, Deceased, is barred by the four (4) year statute of limitations.

This Defendant recognizes that the 1975 amendment to Chapter 13 of the Texas Family Code, Art. 13.01, V.A.C.S., which states that a suit to establish paternity must be brought before the child is one (1) year old is not applicable to the case at bar, for the reason that the same is not given a retroactive application. *Alvarado v. Gonzales*, 552 S.W.2d 539 (Tex.Civ.App.—Corpus Christi 1977, no writ); *Texas Dept. of Human Resources v. Delley*, 581 S.W.2d 519 (Tex.Civ.App.—Dallas 1979, ref'd n.r.e.).

The Courts dealt with the problem of what the appropriate statute of limitations is applicable in paternity suits where the illegitimate child was born prior to the effective date of the statute (13.01) in the *Delley* case, cited *supra*.

In *Delley*, the D.H.R., assignee of the child's right to receive child support, filed suit on behalf of a nine year old child to establish the appellee as the biological father of the child. The trial court dismissed the State's suit with prejudice holding the State's cause of action was barred by the four (4) year statute of limitations since the child was born more than four (4) years prior to the filing of the suit.

The Court of Civil Appeals reversed and remanded the judgment of the trial court and held that since no specific statute of limitations is designated for paternity suits concerning children born before September 1, 1975,

the effective date of Art. 13.01 of the Family Code, Article 5529, V.A.C.S., the general four (4) year statute of limitations applies and that Article 5535, which tolls limitations during minority and disability, applies in those cases of children born before September 1, 1975.

The Court further points out that "paternity suits are a prerequisite to the child support for an illegitimate child".

In the case at bar, Plaintiff filed a claim against the Estate of Prince Ricker, Deceased, for child support in the amount of \$21,000.00, which was finally dismissed by Plaintiffs on the day of trial, however, no suit for paternity has ever been brought by this Plaintiff's mother or other representative during Plaintiff's minority or by this Plaintiff, who is now an adult of 24 years. Plaintiff must have filed her paternity action against Prince Rupert Ricker or the Estate of Prince Rupert Ricker on or before November 1, 1980, which date is four (4) years after the removal of her minority. She has not.

In the case of *Bell v. Hinkle*, 607 S.W.2d 936 (Tex.Civ. App.—Hou. (14th Dist.) 1980, no writ), the Appellant Bell brought a trespass to try title suit in certain real property belonging to the Estate of James Thomas Hinkle and for partition of the real and personal property, claiming a one-half (1/2) interest in the property of the estate as an heir at law of the deceased. Appellant, Bell alleged that he was the illegitimate child of the decedant, who died in 1969 intestate. The suit by appellant was filed in 1976.

The Trial Court found that the decedant was not the biological father of Appellant, Bell, and Bell appealed.

On Appeal, the Court of Civil Appeals discussed the law prior to the 1979 amendment to Section 42 of the Texas Probate Code whereby an illegitimate child could not inherit from his father by the laws of descent and distribution. The Court then went on to hold:

"In 1979, the Legislature amended the Probate Code to allow illegitimate children to inherit from their fathers if certain conditions are fulfilled. Tex.Prob.Code Ann., Sec. 42 (Vernon Supp. 1980). An illegitimate child can inherit from his father 'if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a Court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code. . . .' Since appellant has not brought a paternity suit under the Family Code, or met any of the other conditions, he cannot recover under the statute."

The Judgment of the Trial Court was affirmed.

This Defendant says that this Plaintiff has not taken the lawful steps to establish the involuntary legitimation of this child as provided by the Family Code or met any of the other conditions provided for therein, and for this reason, Plaintiff is not entitled to recover any interest in and to the Estate of Prince Rupert Ricker, Deceased. See also Texas Probate Code, Section 42, V.A.C.S. Because Plaintiff has failed in every respect to sue to establish paternity, her cause of action to establish her as an heir at law to the Estate of Prince Rupert Ricker is forever barred.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court deny all of Plaintiff's mo-

tions contained in its Motion for Judgment on the Verdict, and to Disregard Answers of Jury to Certain Special Issues, and Alternatively for Judgment Non Obstante Verdicto, for the reasons mentioned above, and Defendant further prays that the Court sign a final Judgment in this cause in favor of Defendant, ordering Plaintiff take nothing by her suit, and discharging this Defendant with its costs.

Respectfully submitted,

SHAFFER, GILLILAND, DAVIS, McCOLLUM  
& ASHLEY, INC.  
P. O. Drawer 1552  
Odessa, Texas 79760  
(915) 332-0893

BY /s/ PAUL McCOLLUM  
State Bar #13436000

ATTORNEYS FOR DEFENDANT

(Certificate of Service omitted in printing)

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(Caption of District Court omitted in printing)

PLAINTIFF'S ORIGINAL MOTION TO SET ASIDE  
AND MODIFY JUDGMENT, AND ALTERNATIVELY,  
FOR NEW TRIAL

(Filed December 1, 1982)

TO THE HONORABLE JUDGE OF SAID COURT:

Delynda Ann Ricker Barker Reed, Plaintiff in the above-entitled cause, moves the Court to set aside judgment previously rendered in favor of Defendant in this cause, and to enter judgment in favor of Plaintiff on the findings of the jury in response to Special Issues Number 1, 2, 3; to harmonize the answer to Special Issue Number 6 with the answers to Special Issues Number 1, 2, and 3; to disregard the findings of the jury on Special Issues Number 4 and 5 as unsupported by evidence, and immaterial to controlling issues.

Alternatively, Plaintiff requests that the Court grant a new trial in this cause, and to declare that an irreconcilable conflict exists between the answer to Special Issue 6 and Special Issues 1, 2, and 3, and as grounds therefore would respectfully show:

I.

Heretofore in the trial of this cause the Court submitted the case to the jury upon special issues, and the jury returned their findings upon such special issues, which findings were received by the Court and filed and entered on the minutes of the Court. The issues submitted to the jury and the answers thereto are as follows:

*Special Issue Number 1:*

"Do you find from a preponderance of the evidence that Delynda Ann Ricker Barker Reed is the child of Prince Rupert Ricker?" Jury's answer: "YES."

*Special Issue Number 2:*

"Do you find from a preponderance of the evidence that Annabel Boutwell and Prince Rupert Ricker entered into a ceremonial marriage on or about the 24th or 27th day of November, 1957?" Jury's answer: "YES."

*Special Issue Number 3:*

"Do you find from a preponderance of the evidence that on or about the 24th or 27th day of November, 1957, Annabel Boutwell and Prince Rupert Ricker agreed that they would be husband and wife?" Jury's answer: "YES."

*Special Issue No. 4:*

"Do you find from a preponderance of the evidence that on or after the 24th or 27th day of November, 1957, Annabel Boutwell and Prince Rupert Ricker lived together as husband and wife until June, 1958?" Jury's answer: "NO."

*Special Issue No. 5:*

"Do you find from a preponderance of the evidence that after the 24th or 27th day of November, 1957, Annabel Boutwell and Prince Rupert Ricker held themselves out to the public as husband and wife until June, 1958?" Jury's answer: "NO."

*Special Issue No. 6:*

"Do you find from a preponderance of the evidence that on November 24 or 27, 1957, Annabel Boutwell believed Prince Rupert Ricker to be unmarried?" Jury's answer: "SHE BELIEVED HE WAS MARRIED."

## II.

The Honorable Trial Court should have entered judgment for Plaintiff based upon the jury's answer to Special Issue Number 1, that Delynda Ann Ricker Barker Reed is the child of Prince Rupert Ricker. This answer is strongly supported by the evidence and entitles the Plaintiff to Judgment pursuant to the Federal and Texas doctrines of equal protection, regardless of her status as legitimate or illegitimate. In this connection, all the other Special Issues, directed to issues of legitimacy, become immaterial.

## III.

The Honorable Trial Court should have entered judgment for Delynda as the legitimate heir of Prince Rupert Ricker, on the strength of the jury's answers to Special Issues Number 2 and 3, that Prince Ricker and Delynda's mother entered into a ceremonial marriage and agreed to be husband and wife on or about the 24th or 27th day of November, 1957, which date was well prior to the birth of their child, Delynda shown by her birth certificate to be November 1 of the following year. Answers 2 and 3 are amply supported by evidence and entitle Delynda to judgment as the child of Prince Rupert Ricker, legitimate through ceremonial marriage of her parents, accompanied by their agreement to be married. In this connection, inquiry by later Special Issues as to whether there was also a common-law or putative marriage between Delynda's



mother and Prince Rupert Ricker becomes immaterial, and the Honorable Trial Court should have entered judgment for Plaintiff, by disregarding the findings of the jury on Special Issues Number 4, 5, and 6, and entering judgment for Delynda based upon the valid ceremonial marriage.

#### IV.

The Honorable Trial Court should have entered judgment for Plaintiff by disregarding the jury's finding in response to Special Issue Number 4 because the evidence proves conclusively, and the Trial Court should have held that Annabel Boutwell and Prince Rupert Ricker lived together as husband and wife. In addition to other conclusive evidence of co-habitation, it is clear that their co-habitation, following their ceremonial marriage with agreement to be husband and wife, was sufficient to result in the conception of their child, Delynda, in the Spring of the following year. Special Issue Number 4 should not have been submitted to the jury, and should have been disregarded.

#### V.

The Honorable Trial Court should have entered judgment for

#### VI.

The Honorable Trial Court should have entered judgment for Plaintiff by harmonizing the jury's finding in response to Special Issue Number 6 with the findings in response to Special Issues 2 and 3. By its answers to Special Issues Numbers 1, 2, and 3, the jury found that Delynda's mother and father agreed on or about Novem-

ber 24th or 27th, 1957 to be husband and wife, and solemnized that agreement by the vows of the ceremonial marriage, and some months thereafter procreated their child, Delynda. The jury's answer to Special Issue Number 6, was that Delynda's mother Annabel believed that Delynda's father, Prince Rupert Ricker, was married on or about November 24th or 27th, 1957. The answer to Special Issue Number 6 can be harmonized with the jury's earlier findings, if, and only if, it is construed to mean that on the 27th or 24th of November, 1957, Annabel believed that Ricker was married *to herself*, by and because of such agreement to be husband and wife, and the vows of such ceremonial marriage. Such construction is consistent, moreover, with all the evidence concerning subsequent co-habitation and holding out of themselves by Delynda's parents as husband and wife and with the later procreation of Delynda. Answers to Special Issues Numbers 1, 2, and 3 are inconsistent, however, with the construction that on November 24 or 27, 1957, Annabel Boutwell believed that Prince Rupert Ricker was married to someone else, rather than herself, and if the answer to Special Issue Number 6 is given this construction, then a new trial should be granted in light of the conflict of Special Issues created thereby.

#### VII.

Plaintiff, while contending that the Special Issues support judgment for alternatively, this Honorable Trial Court should have granted Judgment Non Obstante Verdicto, as set out below:

B.1

I. The Fourteenth Amendment to the Constitution provides:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. Tex. Prob. Code §37 (Vernon 1980) provides:

"§37. Passage of Title Upon Intestacy and Under a Will

"When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such person, not devised or powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law, and subject to the payment of court-ordered child support payments that are delinquent on the date of the person's death; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exception aforesaid shall still be liable and sub-

## B.2

ject in their hands to the payment of the debts of the intestate and the delinquent child support payments; but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law."

### III. Tex. Prob. Code §42

A. As originally enacted in 1955 provided:

#### "§42. Inheritance Rights of Illegitimate Children

"For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property, and the making of family allowances. Where a man, having by a woman a child or children shall afterwards intermarry with such



B.3

woman, such child or children shall thereby be legitimated and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate."

B. As Amended in 1977 provided:

"Sec. 42. Inheritance Rights of Illegitimate Children

"(a) Maternal Inheritance. For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

"(b) Legitimation by Marriage. Where a man, having by a woman a child shall afterwards intermarry with such woman, such child shall thereby be legitimated, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

"(c) Legitimation by Voluntary Legitimation Proceeding. Where a man, having by a woman a child shall afterwards legitimate the child pursuant to a voluntary legitimation proceeding under Chapter 13, Family Code, such child and his issue shall inherit from his father but not from

his paternal kindred; and the father, but not the father's kindred, shall inherit from such child and his issue.

"(d) Homestead Rights, Exempt Property, and Family Allowances. Such child shall also be treated the same as if he were a legitimate child of his mother, and, if legitimated by marriage or by voluntary legitimation, as if he were a legitimate child of his father, for the purpose of determining homestead rights, distribution of exempt property, and the making of family allowances.

"(e) Marriages Null in Law. The issue also of marriages deemed null in law shall nevertheless be legitimate."

C. As Amended in 1979 provided:

"§ 42. Inheritance Rights of Legitimated Children

"(a) Maternal Inheritance. For the purpose of inheritance, a child is the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

"(b) Paternal Inheritance. For the purpose of inheritance, a child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a court decree as provided

by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from his and his issue.

"(c) Homestead Rights, Exempt Property, and Family Allowances. A legitimate child as provided by Subsections (a) and (b) of this section is a legitimate child of his mother, and a legitimate child of his father, for the purpose of determining homestead rights, distribution of exempt property, and the making of family allowances."

#### IV. Tex. Fam. Code §13.01

A. As Originally Enacted in 1975 provided:

"Sec. 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

B.6

B. As Amended in 1981 provided:

"Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is four years old, or the suit is barred."

C. As Amended in 1983 provides:

"Sec. 13.01. Time Limitation of Suit. A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought on or before the second anniversary of the day the child becomes an adult, or the suit is barred.

"Section 2. A cause of action that was barred before the effective date of this Act but would not have been barred by Section 13.01, Family Code, as amended by this Act, is not barred until the period of limitations provided by Section 13.01, Family Code, as amended by this Act, has expired."

- V. Tex. Fam. Code §13.02 (Vernon Supp. 1975-1980) provides:

"§13.02 Pretrial Proceedings:  
Blood Tests

"(a) When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood for the purpose of one or more blood tests. If the appearance is before the birth of the child, the court shall order the taking of blood to be made as soon as medically practical after the birth.

"(b) An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refuses to submit to the blood test, the court shall dismiss the suit. If the respondent is the mother or the alleged father and refuses to submit to the blood tests, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code."

INDEX TO APPENDIX C

IN ALL THESE CASES, DEATH OCCURRED  
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CASES IN WHICH THE TRIMBLE ANALYSIS  
WAS APPLIED, THOUGH THE ISSUE OF  
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THESE CASES WERE DIRECT APPEALS (NOT  
COLLATERAL ATTACKS) . . . . . C.1

CASES WHICH ALSO AROSE ON DIRECT  
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IN ALL THESE CASES, DEATH OCCURRED BEFORE  
THE TRIMBLE DECISION.

IN THE CASES LISTED AND BRIEFED BELOW, THE  
TRIMBLE ANALYSIS WAS APPLIED, THOUGH THE  
ISSUE OF RETROACTIVITY WAS NOT ADDRESSED.  
THESE CASES WERE DIRECT APPEALS (NOT  
COLLATERAL ATTACKS).

LIST OF CASES:

1. Trimble v. Gordon, 430 U.S. 672  
(1977)
2. Lalli v. Lalli, 439 U.S. 257  
(1978)
3. In Ramon v. Califano, 493 F.Supp.  
158 (W.D. Tex. 1980)
4. Nagle v. Wood, 178 Conn. 180,  
423 A.2d 875 (Conn. 1979)
5. Easley v. John Hancock Mutual  
Life, 403 Mich. 521, 271 N.W.2d 513  
(Mich. 1978)

6. In re Estate of Burris, 361 So.2d 152 (Fla. 1978)

7. Andrade v. Jackson, 401 A.2d 990 (D.C. 1979)

CASES BRIEFED:

1. Trimble v. Gordon, 430 U.S. 672 (1977), itself involved a direct appeal from the open estate. Striking the insurmountable statutory barrier, Trimble vested the father's estate in his non-marital child, to the exclusion of his collateral heirs.

2. Lalli v. Lalli, 439 U.S. 257 (1978), similarly applied the test explained in Trimble. The Lalli death occurred in 1973. Lalli distinguished the New York statutory barrier as not insurmountable.

3. Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980), held invalid the insuperable barrier to heirship by illegitimates in §42 of the Texas Probate Code, holding that the claimant was therefore entitled to Social Security survivor's benefits.

4. Nagle v. Wood, 178 Conn. 180, 423 A.2d 875 (Conn. 1979), struck down the Connecticut statute, applying Trimble without retroactivity discussion. Nagle separately refused retroactive effect to a statute. The discussion of the statute's nonretroactivity was erroneously relied on in the case at hand, through Winn.

5. Easley v. John Hancock Mutual Life, 403 Mich. 521, 271 N.W.2d 513 (Mich. 1978), struck down the Michigan statute citing Trimble. The death occurred in 1970.

6. In re Estate of Burris, 361 So.2d 152 (Fla. 1978), applied Trimble to strike down the Florida statute where the death was in May of 1975.

7. Andrade v. Jackson, 401 A.2d 990 (D.C. 1979), indicated that Trimble would apply to the rights of the children after transfer of the case into the probate court, notwithstanding any invalidity of the parents marriage, at note 9.

\* \* \*

THESE CASES ALSO AROSE ON DIRECT APPEAL,  
(NOT COLLATERAL ATTACK). THE COURTS  
RECOGNIZED THE RETROACTIVITY ISSUE AND  
HELD TRIMBLE WOULD BE APPLIED  
RETROACTIVELY.

LIST OF CASES:

1. Lovejoy v. Lillie, 569 S.W.2d 501  
(Tex. Civ. App. -- Tyler 1978, writ  
ref'd, n.r.e.).

2. Succession of Trosclair, 423  
So.2d 745 (La. App. 1982)

3. Estate of Sharp, 163 N.J. Super.  
148, 377 A.2d 730 (N.J. Ch. 1977)

4. Marshall v. Marshall 670 S.W.2d  
213 (Tenn. 1984)

5. Gross v. Harris, 664 F.2d 667  
(8th Cir. 1981)

CASES BRIEFED:

Each of these four cases, except the  
Texas case, discussed and distinguished  
the collateral attack context in finding  
that Trimble would apply to a direct  
appeal.



In each of these cases the analysis in Trimble was applied retroactively where the death occurred before Trimble (and also before the state decision applying Trimble in Tennessee and Louisiana). The claims in the Tennessee, New Jersey, and Eighth Circuit cases were filed after Trimble, bringing them onto all-fours with the chronology of the case at hand.

1. In Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App. -- Tyler 1978, writ ref'd, n.r.e.), Trimble was applied retroactively to pre-1977 §42 of the Texas Probate Code, the statute at hand. Rejecting the argument that Trimble should not be applied because it was decided after the application for probate, Lovejoy held that it was appropriate to apply Trimble retroactively because it was decided before judgment in the case, and

held that the stage of the proceedings when Trimble was decided was immaterial.

2. Succession of Trosclair, 423 So.2d 745 (La. App. 1982), held that the Trial Court erred in making the date of decedent's death the determining factor in applying Trimble, as adopted in Louisiana by the Brown decision. Trosclair instead recognized that the controlling factor was that the claim was presented in an open estate rather than on collateral attack.

It wrote:

Appellants maintain that the Trial Judge erred in making the date of decedent's death the determining factor. We agree. This litigation is on-going, no judgment of possession has been rendered, and that distinguishes this case from those which turn on the effective date of Brown.

This Court's concern has been the "substantial inequity [that] would result if all prior judgments of possession which relied on the substantive law of LSA-C.C. Art. 919 were declared invalid, and such a holding would engender new litigation

in each case where there had been such a justified reliance."

Succession of Ross, supra, at P. 831.

(Emphasis added) In this case no property rights have been acquired based on Art. 919, the old rule. There has been no reliance on the prior law, no prior judgments need be overturned, and no injustice or hardship will result. Instead, the equal treatment to illegitimates mandated by Brown will be accomplished. Accordingly, there is no reason to deny appellants the benefit intended by Brown if they can prove their filiation.

3. Estate of Sharp, 163 N.J. Super. 148, 377 A.2d 730 (N.J. Ch. 1977) affirmed as modified, 394 A.2d 381 (N.J. App., 1978), held that a will was void because it did not provide for the inheritance rights of an afterborn illegitimate child which were held to exist under Trimble. The district court expressly held that Trimble applied in the precise chronological posture of the case at hand.

This court simply holds that where the death was before Trimble v. Gordon but the will was not offered

for probate until after that case was decided, and where the will is so ambiguous that no beneficiary could have reasonably relied upon its terms as to the receipt of any gift, Trimble v. Gordon should be applied.

Sharp distinguished the case from one on collateral attack.

[P]rospective application may be particularly fair in a property case where persons have justifiably relied on prior law. Thus, the court does not suggest that estates of intestate male decedents who died before Trimble v. Gordon were wrongfully distributed when illegitimate children were not included. Nor does the court suggest that if a testate male decedent died before Trimble v. Gordon and failed to mention or provide for an illegitimate child born after the execution of his will, that the will, if probated before Trimble v. Gordon, should have been treated as revoked in whole or in part . . . (cites omitted).

4. Marshall v. Marshall, 670 S.W.2d 213 (Tenn. 1984) held that Trimble, as applied to the laws of Tennessee in Allen v. Harvey, should be applied retroactively in the exact chronological posture of this case. The court did so because, as in the

case at hand, the equities which attach at the closing of an estate were absent. In deciding Allen, the court allowed inheritance to the nonmarital claimant, but stated that the case would otherwise apply only prospectively and to cases pending when it was decided. On the strength of Allen, the lower Court in Marshall held that the claim was barred. The death was before Trimble and Allen, in March 1985. The claim was first brought in September 1978, after Trimble and after Allen.

Marshall was controlled by the precise factors which distinguish this case from one on collateral attack. The court held that, for a civil case to deny retrospective application of a decision overruling an earlier decision, the claimed reliance on the old rule must have been real, meaning that the litigants must have

acted in reliance. Their reliance must have further been such that the hardship resulting to them from it would affirmatively outweigh the hardship on the party denied the benefit of the new rule. The court pointed out that "Since there are few cases where such rigorous demonstrations can be made, there should be few occasions when prospective overruling can justifiably displace the normal retroactive application of the overruling decision." The court noted that the hardship of those relying on the old rule did not outweigh the hardship on the party denied the benefit of the new rule in Allen. The factors considered by the court in making this determination are those unique to a direct attack from a claim filed in open probate. The court



refused to apply the unconstitutional statute, noting:

The defendants in the present case have not acted in reliance upon the precedent overruled by Allen, they merely assert that they have passively acquired rights as the heirs at law of an intestate property owner; they are not innocent purchasers for value of the property they seek to claim; and, neither do they assert the rights of those who claim under a valid court decree that has determined the identity of the heirs at law of an intestate property owner.

Significantly to the present case, Marshall modified Allen v. Harvey, 568 S.W.2d 829 (Tenn. 1978), precisely where it was relied on by the case at hand, through Winn.

5. Gross v. Harris, 664 F.2d 667 (8th Cir. 1981), held that Trimble should be applied because of the purpose of the rule it announced. The court specifically considered the chronological context of the cases, deciding that

Trimble would be applied where the deaths were before Trimble and the claims were filed after (n.3). Gross found that the second of Chevron's requirements for prospective-only application of a decision was lacking. The court noted:

It is self-evident that the purpose of the Trimble decision was to prevent constitutionally impermissible discrimination against illegitimates. Retrospective application of Trimble would further the Trimble purpose.

Gross declined to address the issue determined by Marshall, supra, regarding the absence of reliance by other heirs and the lack of their equities, because it was not required to do so in a Social Security case.

\* \* \*

IN DECIDING COLLATERAL ATTACKS ON CLOSED ESTATES, THESE CASES HELD TRIMBLE WOULD NOT BE APPLIED RETROACTIVELY, THEREBY PROTECTING THE FINAL JUDGMENT.

LIST OF CASES:

1. Winn v. Lackey, 618 S.W. 910  
(Tex.Civ.App.--Eastland 1981, no writ).
2. Frakes v. Hunt, 266 Ark. 171, 583  
S.W.2d 497 (Ark. 1979).
3. Wilson v. Jones, 281 S.C. 230,  
314 S.E.2d 341 (S.C. 1984).
4. Estate of Rudder, 78 Ill. App.  
3d 517, 397 N.E.2d 556 (Ill. App., 1979).
5. Herndon v. Herndon, 388 So.2d  
463 (La. App. 1980).

CASES BRIEFED:

1. In Winn v. Lackey, 618 S.W. 910  
(Tex.Civ.App.--Eastland 1981, no writ),

the collateral attack was a suit to partition real estate awarded by a final probate decree in two legitimate children. The court declined to apply Trimble retroactively. Winn distinguished Lovejoy on the basis that in Lovejoy the claim was brought before Trimble while in Winn it was brought after. The lower court relied heavily on Winn. Because Winn involved a closed estate, this reliance was misplaced.

2. Frakes v. Hunt, 266 Ark. 171, 583 S.W.2d 497 (Ark. 1979), was heavily relied on by Winn. In Frakes, the estate was closed but the assets were substantially intact. Citing considerations relevant only in closed estates, the court stated broadly that to apply Trimble would lead to chaos from lack of title to real property.

3. In Wilson v. Jones, 281 S.C. 230, 314 S.E.2d 341 (S.C. 1984), the collateral attack was in the form of a suit for partition of lands. The court said flatly that the unconstitutional statute would be applied to all deaths before Trimble.

4. In Estate of Rudder, 78 Ill. App. 3d 517, 397 N.E.2d 556 (Ill. App. 1979), the funds were distributed, the administrator was discharged and the estate was ordered closed before Trimble. The statutory time to re-open had lapsed. The collateral attack, filed after Trimble, was styled a "Petition to Re-Open Estate and Set Aside Awards and Allowances". The court said that the facts in that case meant that retroactive application would disrupt the orderly process of probate. The court indicated that the result might have been different, at least with regard

to the claim under the amended statute, if the estate had remained open.

5. Herndon v. Herndon, 388 So.2d 463 (La. App. 1980), held that the issue of constitutionality was waived because it was not presented at trial. The dicta of the court that Succession of Brown would not be applied retroactively proved erroneous, as shown by the holding of the court in Succession of Clivins. That dicta was relied on by the case at hand, however, through the Winn opinion.

\* \* \*

THESE CASES ALLOWED RECOVERY ON CLAIMS FILED IN OPEN ESTATES, WHERE BOTH DEATH AND CLAIM WERE BEFORE TRIMBLE, WITH DICTA THAT CLAIMS FILED AFTER TRIMBLE (OR THE STATE DECISION APPLYING TRIMBLE) WOULD BE DENIED.



LIST OF CASES:

1. Allen v. Harvey, 568 S.W.2d 829  
(Tenn. 1978).
2. Murray v. Murray, 564 S.W.2d 5  
(Ky. 1978).
3. Stewart v. Smith, 268 Ark. 766,  
601 S.W.2d 837 (Ark. 1980).
4. Lucas v. Handcock, 266 Ark. 141,  
583 S.W.2d 491 (Ark. 1979).

CASES BRIEFED:

1. Allen v. Harvey, 568 S.W.2d 829  
(Tenn. 1978), involved a death in  
1942 and two other deaths at unknown  
times. The estates had not been probated,  
although one of them was open. The court  
held that the nonmarital children were  
entitled to heirship. It stated in dicta  
that the decision would operate only  
prospectively and on claims pending when  
it was released. This dicta, relied on by

the court below through Winn, was later rejected by the same court in a case which concretely presented the issue of retroactivity. The Allen court appreciated the significance of the open, or unopened, status of the cases it decided, stating also that its holding would apply only where rights of inheritance had not finally vested.

2. Murray v. Murray, 564 S.W.2d 5 (Ky. 1978), softened the dicta of the same court in Pendleton that the insurmountable barrier would be applied unless the dispositive constitutional issue had been raised before Trimble, where the father died before Trimble. Murray reversed the decision of a court of appeals based on this dicta that the claimant could not inherit because the equal protection claim was not raised

until after Trimble. The nonmarital claimant had been excluded from inheritance based on the bastardy statute, and that fact was held sufficient presentation of the constitutional issue.

3. Stewart v. Smith, 268 Ark. 766, 601 S.W.2d 837 (Ark. 1980), followed the softened Murray approach, holding that where litigation was pending which included an objection to inheritance of the nonmarital children on the basis of bastardy, the constitutional issue was raised.

4. Lucas v. Handcock, 266 Ark. 142, 583 S.W.2d 491 (Ark. 1979), held that the constitutional issue had been raised where the appellant "was recognized as an heir at the time of the decision in Trimble. His right to inherit was not questioned until nearly a year after Trimble was

decided." The court distinguished Frakes on the basis that in that case, nothing was filed until after Trimble. The case at hand falls somewhere between Frakes and Lucas v. Handcock, because in it Delynda's heirship was omitted from the initial pleadings in the case by appellees. Lucas thus seems a step toward the analysis that it is the openness of the estate which is controlling.

\* \* \*

LOUISIANA HAS A SPECIAL RULE BECAUSE TRIMBLE DID NOT OVERRULE LABINE, WHICH HAD SUSTAINED THE LOUISIANA STATUTE.

CASE BRIEF:

1. In Succession of Clivins, 426 So. 2d 585 (La. 1983), the court applied the test of Chevron v. Huson. The court first held that the Brown opinion, which struck

down the statute upheld in Labine, was foreshadowed. Second, the court found that the purpose of Trimble would be served by retroactive application. The court then grappled with how to effect Trimble's intent of fairness to the nonmarital child without causing impermissible hardship. It concluded that hardship could be avoided by limiting the retroactivity to claims against heirs, as opposed to third parties, and to intestate, as opposed to testate, estates. On rehearing, 426 So.2d 593, the court rejected this solution as unworkable and instead made the Brown opinion retroactive to the enactment of the amended Louisiana constitution at the end of 1974. The court held that no substantial hardship would result from this rule because the new constitution foreshadowed Brown. It

stated: "No law shall . . . discriminate against a person because of birth. . . ."

Finally, the court noted that interference with land titles would be minimal under statutes amended after Brown. These statutes required that a filiation action by an unacknowledged illegitimate be brought before the claimant was nineteen, within one year of the parent's death, or one year from the date of the act for persons excluded by the first two restrictions. The legislature also reduced from ten to two years the time for challenging a judgment of possession after property passed into the hands of a third person. The court noted that the 1974 cut-off would protect persons who had been placed in possession of property many years before and relied on their ownership to their detriment. By this reasoning, the court



approached the motivation of finality of judgments and closure of estates to shield them from collateral attacks.

\* \* \*

CASE IN WHICH TRIMBLE WAS APPLIED, WITH EXTREME RELUCTANCE, TO A CLOSED ESTATE.

BRIEF:

Pendleton v. Pendleton, 431 U.S. 911 (1977), was vacated by this Court for further consideration in light of Trimble v. Gordon. The first opinion of the Kentucky court, 531 S.W.2d 507 (Ky. 1975), shows that the decedent died in 1966. Affidavits of descent were filed the same year, and the property was transferred in reliance on them. The estate had been distributed. The collateral attack was in the form of a claim against the administrator, his surety, the persons to whom

the administrator had distributed the estate, and other defendants who had become record owners of his father's real estate. On remand, the court declared the Kentucky statute unconstitutional, and accorded equal protection to the claimant against the other defendants who had become record owners of his father's estate. The court stated in dicta that the statute would be applied to the devolution of title before Trimble, except where the constitutional issue was then in the process of litigation. The Kentucky court, when confronted with an open estate in Murray, allowed inheritance by adopting a lax reading of the "process of litigation" requirement. Murray is a step toward full retroactivity of Trimble in open estates. The case at hand relied, through Winn, on the dicta Pendleton.

Murray underscores that reliance was inappropriate in an open estate.

\* \* \*

CASES APPLYING THE INVALID STATUTE TO CONTROL THE RESULT, DESPITE TRIMBLE, IN ESTATES STILL PENDING WHEN THE CLAIM WAS BROUGHT.

LIST OF CASES:

1. The case at hand, Reed v. Campbell, 682 S.W.2d 697 (Tex. App. --El Paso 1984, writ ref'd, n.r.e.).

2. Compton v. White, 266 Ark. 648, 587 S.W.2d 829 (Ark. 1979).

3. Ford v. King, 268 Ark. 128, 594 S.W.2d 227 (Ark. 1980).

CASES BRIEFED:

1. The case at hand, Reed v. Campbell, 682 S.W.2d 697, 700 (Tex.App.

--El Paso, 1984, writ ref'd, n.r.e.),  
disposed of Trimble in a single sentence:

Under the rule of Winn v. Lackey,  
supra, and the out-of-state cases  
cited therein, the equal protection  
argument fails as Trimble v. Gordon,  
430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct.  
1459 (1977), has not been applied  
retroactively where the father died  
before the case came down and suit was  
filed afterwards."

The court was apparently untroubled  
by the absence of Chevron factors in an  
open and pending estate.

2. Compton v. White, 266 Ark. 648,  
587 S.W.2d 829 (Ark. 1979), is the only  
other case which closely resembles the  
case at hand. Paternity was abundantly  
proven. Heirship was refused in the open  
estate for the sole reason that the dece-  
dant died less than one month before  
Trimble and no claim was filed in his  
estate until after Trimble.

3. In Ford v. King, 268 Ark. 128, 594 S.W.2d 227 (Ark. 1980), the decedent died in 1928. The property remained in the possession of some of his descendants for 50 years. In March, 1978, nine of his descendants brought a suit for partition and determination of heirship. After a decree had been entered determining heirship and ordering the sale, the descendants of an alleged illegitimate daughter of decedent intervened. Proof of relationship was undocumented and improbable. The court refused to apply Trimble, giving among its reasons that the death was before Trimble and the claim was brought afterward.

NO. 85-755

Supreme Court, U.S.  
FILED  
FEB 1 1988  
JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1985

\*\*\*\*\*

DELYNDA ANN RICKER BARKER REED, APPELLANT

V.

PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY,  
AND AS ADMINISTRATRIX OF THE ESTATE OF  
PRINCE RUPERT RICKER, DECEASED, APPELLEE

\*\*\*\*\*

ON APPEAL FROM THE COURT OF APPEALS FOR THE  
EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANT'S BRIEF ON THE MERITS

R. Stephen McNally  
P.O. Box 1586  
Austin, Texas 78767-1586  
(512) 474-1397

COUNSEL OF RECORD FOR APPELLANT  
DELYNDA ANN RICKER BARKER REED

APPEAL DOCKETED OCTOBER 15, 1985  
PROBABLE JURISDICTION NOTED DECEMBER 9, 1985



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QUESTIONS PRESENTED

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RETROACTIVITY QUESTIONS:

1. Should Delynda be denied the benefit of the holding of this Court in Trimble v. Gordon under the "time of filing" test applied by the state court below?

2. Should Delynda benefit from the holding of this Court in Trimble v. Gordon under the test of Chevron v. Huson?

3. Should the retroactivity of Trimble be determined by whether the claim was filed in an open estate or as a collateral attack on a closed estate?

(ii)

SEXUAL CLASSIFICATION QUESTIONS:

4. Where maternal heirship requires only a preponderance of the evidence while paternal heirship is not allowed, is the distinction permissible?

5. Was the denial of Delynda's heirship from Prince Ricker justified in light of the jury's unchallenged finding of paternity and the convincing proof at trial?

LEGITIMATION QUESTION:

6. Does the Fourteenth Amendment require an opportunity for Delynda to legitimate herself equivalent to the statutory procedures arbitrarily denied her?

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LIST OF PARTIES

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The Appellant is Delynda Ann Ricker Barker Reed. The Appellee, individually and as administratrix of the estate, is Princess Ann Ricker Campbell Ham. In addition, the following Appellees were also Appellees in the state action:

1. Rosemary Jane Ricker Farrell,
2. Prince Ricker, Jr.,
3. Brett Drayton Ricker, and
4. Mark Ricker

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I.

THE ILLEGITIMACY CLASSIFICATION OF TEXAS' PROBATE CODE §42, BY MAKING DELYNDAS STATUS OF BIRTH AN INSUPERABLE BAR TO HEIRSHIP FROM HER FATHER, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION . . . 20

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OPINIONS AND JUDGMENTS BELOW

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The published opinion and denial of rehearing by the Court of Appeals, Eighth Supreme Judicial District of Texas (reprinted in appendix A of the Jurisdictional Statement, pp. A.1 - A.14) is reported as: Reed v. Campbell, 682 S.W.2d 697 (Tex.App.--El Paso 1984, writ ref'd n.r.e.).

Notation of the Texas Supreme Court's refusal of application for writ of error, with the notation "no reversible error", (reprinted in Appendix A of the Jurisdictional Statement, pp. A.20 - A.21) is published in the advance sheets, 691 S.W.2d, No.2, p.8.

The following orders are unreported: order of the state district court denying Delynda heirship (reprinted in appendix A of the Jurisdictional Statement, pp. A.15-A.19); order of the Court of Appeals overruling Delynda's motion and amended motion for rehearing (reprinted in appendix A of the Jurisdictional Statement, pp. A.26 - A.27); and order of the Texas Supreme Court of July 17, 1985, overruling Delynda's amended motion for rehearing (reprinted in appendix A of the Jurisdictional Statement, pp. A.22 - A.23.

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JURISDICTIONAL GROUNDS

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This Court has jurisdiction of this appeal under 28 U.S.C. §1257(2).

The judgment of the Texas Supreme Court overruling Appellant's amended motion for rehearing was entered on July 17, 1985. Notice of appeal to this Court was mailed to the clerk of the Court of Appeals on September 27, 1985, and filed on September 30, 1985. This appeal was docketed in the Supreme Court of the United States on October 15, 1985, as No. 85-755. Probable Jurisdiction was noted by this Court on December 9, 1985.

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CONSTITUTION AND STATUTES

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1. The enacting legislation of Chapter 13 of the Family Code provides: "This act takes effect September 1, 1975." cited as: TEX. FAM. CODE, Ch. 476, §58, 1975 TEX. GEN. & SPEC. LAWS, 1273.

2. §13.21 of the Voluntary Legitimation Subsection, Subsection B of the Family Code provides:

Section 13.21. Voluntary Legitimation

(a) If a statement of paternity has been executed by the The father of an illegitimate child, the father or mother of the child or the Texas Department of Human Services may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

cited as: TEX. FAM. CODE ANN. §13.21(a)

(Vernon 1986, pamph.)

Appendix B of the Jurisdictional  
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3. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, reprinted at J.S. App. B.1;

4. TEX. PROB. CODE. §37 (Vernon, 1980), reprinted at J.S. App. B.1 - B.2;

5. The 1956 §42 of the Texas Probate Code, as originally enacted and made effective January 1, 1956; cited as: TEX. PROB. CODE Ch. 55, §42, 1955 TEX. GEN. & SPEC. LAWS 88, 102, amended by Act of May 28, 1977, ch. 290, § 1, 1977 TEX. GEN & SPEC. LAWS, 762, 762-63, reprinted at J.S. App. B.2.

6. The 1977 version of §42 of the Probate Code, effective May 28, 1977; cited as: TEX. PROB. CODE, Ch. 290, §1, 1977 TEX. GEN. & SPEC. LAWS, 762, 762-63,

amended by Act of March 22, 1979, Ch. 24,  
§ 25, 1979 TEX. GEN. & SPEC. LAWS 35, 40;  
reprinted at J.S. App. B.3 - B.4.

7. The 1979 version of §42 of the  
Probate Code, effective August 27, 1979;  
cited as: TEX. PROB. CODE §42 (Vernon  
1980), reprinted at J.S. App. B.4 - B.5.

8. TEX. FAM. CODE, Ch. 476, §24, 1975  
TEX. GEN & SPEC. LAWS 1261, 1261-62,  
amended by Act of June 16, 1981, Ch. 674,  
§2, 1981 TEX. GEN. & SPEC. LAWS 2536, 2537.

9. TEX. FAM. CODE, Ch. 674, §2, 1981  
TEX. GEN. & SPEC. LAWS 2536, 2537 amended  
by Act of June 19, 1983, Ch. 744, §1, 1985  
TEX. GEN. & SPEC. LAWS 4530, 4530-31.

10. TEX. FAM. CODE ANN. §13.01 (Vernon  
Supp.- 1975-1985).

11. TEX. FAM. CODE ANN. §13.02 (Vernon  
Supp. 1975-1985).



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STATEMENT OF THE CASE

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Delynda appeals from a judgment denying her heirship from her father based on her illegitimacy (J.S. App. A.15).

The jury found that there was a father-daughter relationship between Delynda and her father, who was named Prince Rupert Ricker (J.A. 63, Issue 1). Delynda's parents married eleven months before her birth (J.A. 63, 64, Issue 2). Delynda's parents agreed at that time to be husband and wife (J.A. 64 Issue 3).<sup>1</sup>

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1. The jury finding of paternity, and of the invalid marriage ceremony and agreement, were not challenged by an evidence point in the court of appeals, and are therefore conclusively established. Lovejoy v. Lillie, 569 S.W.2d 501, 504-505 (Tex. App. -- Tyler 1978, writ ref'd n.r.e.). (continued)

Delynda was adjudged illegitimate because her parents' marriage was invalid, since her father was already married

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1. (continued)

There was ample evidence besides Prince Ricker's invalid marriage to her mother which supported the jury's finding that he is Delynda's father. Delynda's mother had intercourse only with Prince Ricker from their wedding until Delynda was born (S.F. 889). Delynda's mother lived with Prince Ricker as husband and wife after their wedding (S.F. 40). The couple kept two households, near their respective jobs, in neighboring towns (S.F. 120, 72) and did not spend every night together (S.F. 27, 72). Prince Ricker in 1960 admitted to his then-fiance Marilyn Watts that he had been living with Delynda's mother when she became pregnant with Delynda (S.F. 610). While pregnant with Delynda, Delynda's mother told Prince Ricker's mother that he was the father (S.F. 649). Near his death, Prince Ricker told his sister and her husband: "Annabel [Delynda's mother] and I were living together. There was no one else" (S.F. 450). On this occasion, Prince Ricker identified Delynda to his sister and her husband as the child born out of wedlock of whom he had written in his

(continued on next page)

to another woman, and was not divorced until eight months before Delynda was born (J.A., divorce decree cited 41-43).<sup>2</sup>

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1. (continued)

A.A. work. In his sister's words, he "called her by name . . . Delynda, and said he never did anything for her and that he was sorry . . . about it" (S.F. 449).

In the opinion of Prince Ricker's sister, Delynda is "a perfect cross between her mother and Prince" (S.F. 430). A family resemblance is evident in comparing pictures such as P.E. 2 (O&A: S.F. 31); P.E. 8-12 (O&A: S.F. 439); P.E. 13 (O&A: S.F. 641); and P.E. 17 (O&A: S.F. 864). Prince Ricker identified Delynda as his child to various acquaintances throughout his life, including his driver, Armando Martel, whose advice he sought regarding Delynda's adoption by Jerry Barker (E.g., S.F. 146).

2. Although the children of marriages "null in law" were made legitimate by the 1956 §42 of the Probate Code, the Texas courts each overruled sub silentio Delynda's points of error urging that she was entitled to heirship by virtue of her parents' bigamous marriage.

Delynda's father died intestate on December 22, 1976 (J.A. 6), four months before this Court handed down its opinion in Trimble v. Gordon, 430 U.S. 672, on April 26, 1977. His estate has since remained in open administration.

Delynda filed a claim for child support from her father's estate on February 16, 1978, (J.A. 13), less than ten months after Trimble. Delynda filed an Application for Heirship on June 15, 1978 (J.A. 15), less than eighteen months after her father died.

Her application was filed before the publication of notice on November 9, 1978 to persons having claims against her father's estate (J.A. 21).

After being assured by Prince Ricker's father, an attorney, that she was divorced from Prince Ricker, Delynda's

mother married again, to Jerry Barker, in February of 1959 (S.F. 93). Jerry Barker adopted Delynda on October 21, 1965 (P.E. 6, O&A: S.F. 211). Prince Ricker was given notice of Delynda's adoption. He showed his driver, Martel, the adoption papers and asked his advice concerning the adoption. Prince Ricker approved of Jerry Barker, and reached a decision in favor of the adoption: "I believe he's a good man, so I believe I'm gonna do it" (S.F. 147).

Before she was adopted, Delynda had no right of paternal child support because Gomez v. Perez, 409 U.S. 535 (1973), had not yet been decided. After her adoption, she still had no right to paternal support since Gomez did not give adopted children a right of support against their natural fathers.

The Texas legislature, responding to Gomez v. Perez, enacted a procedure whereby a father could voluntarily take on a duty to support his nonmarital children. Prince Ricker did not make use of this procedure with respect to Delynda.

In 1975 the Texas legislature responded to cases recognizing support rights under Gomez by enacting statutory procedures for securing legitimation and support. Delynda was denied the benefit of the statutory action because she was born before its effective date.

The statute applied by the lower court to deny heirship to Delynda was the Texas Probate Code as enacted in 1956. The 1956 §42 allowed paternal heirship only if the parents had married. Since her parents' marriage had been declared invalid, Delynda was also deprived of the benefit of this statute.

After Delynda's father died, Trimble v. Gordon struck down an Illinois statute identical to §42, and §42 was twice amended. The 1977 amendment granted heirship to children whose fathers had legitimated them voluntarily under the 1973 Family Code. The 1979 amendment additionally granted heirship to illegitimates who prevailed in a suit under the 1975 Family Code. But since the enacting legislation did not make the amendments retroactive where the decedent had died before their effective dates, Delynda was denied any benefit of the amendments, as her father died before they were enacted.

There is no evidence that Delynda knew the marriage of her natural parents had been invalid until she brought this action (e.g., S.F. 888, 879-882).



The central ruling of the appeals court was that Trimble v. Gordon would not be applied retroactively where the father died before Trimble and the suit for heirship was filed afterwards.

Second, the lower court held that, even if Delynda could claim under the amendments, her exclusion by their substantive terms would not deny equal protection because a "rational state basis" supported the exclusion. The lower court did not address Delynda's claim that the Texas probate statutes discriminate against mothers who face the intestate death of the fathers of their illegitimate children. I did not address the invidiousness of the Family Code's effective-date exclusion based on her birth date nor her exclusion from the Family Code procedure for purely voluntary legitimation by the father. And it did not address whether

Delynda should have had any heirship rights by virtue of the 1977 and 1979 amendments to the Probate Code, which recognized rights of heirship only under the Family Code procedures.

The Texas Supreme Court refused to review the case on a writ of error, noting "no reversible error". Probable Jurisdiction was noted on December 9, 1985.

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#### SUMMARY OF ARGUMENT

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Delynda seeks relief under the Fourteenth Amendment from state statutory classifications under which she has been denied heirship from her father and statutory legitimation remedies. These illegitimacy classifications are repugnant to the Fourteenth Amendment because Delynda was afforded no reasonable opportunity to be legitimated, and the denial had

no substantial relationship to any permissible state purpose.

Probate Code §42 has posed an insuperable barrier to Delynda's heirship, while legitimate children, such as Appellee, were allowed full inheritance rights from their fathers. The 1956 §42 applied by the lower court to disinherit Delynda was indistinguishable from the Illinois statute struck down in Trimble v. Gordon, 430 U.S. 762 (1977). The lower court's sole rationale for sustaining this statute against the illegitimacy discrimination attack was that Trimble had not been applied retroactively where the father died before the case came down and suit was filed afterwards.

It was erroneous for the lower court to apply its "time of filing" test rather than the three-prong test of Chevron v. Huson, 404 U.S. 97 (1971). Under Chevron, Trimble applies

retroactively to open estates. First, it had become foreseeable before Trimble that insurmountable illegitimacy barriers in probate might be struck down. Second, Trimble's purpose is frustrated by the refusal to apply Trimble's ruling, because the estate of Delynda's father is still in open probate. Third, the equities favor retroactive application. Appellee can show no reliance on inconsistent prior law, nor on a final judgment.

The sexually discriminatory aspect of the classifications applied to defeat Delynda's heirship is a second and independent reason that they are repugnant to the Fourteenth Amendment. The bastardy classifications imposed on Delynda's heirship are subject to a gender-based subclassification. Surviving mothers of illegitimate children are disadvantaged by the continuing denial of paternal inheritance to an illegitimate child, while full

maternal inheritance rights have been allowed. This limitation on illegitimacy disinheritance gives a surviving father the benefit of the mother's estate when discharging his duty to support his non-marital child. Based solely on her sex, the statute continues to deny a surviving mother this benefit. The gender-based subclassification is not substantially related to state interests in order in probate, because it is under-inclusive in cases like the one at hand, where a child is able to convincingly show paternity.

The lower court gave no explanation for its rejection of Delynda's sex discrimination argument. Upon refusing to review the bastardy classification under even "insurmountable barrier" Equal Protection analysis, the lower court should have struck the statute on the basis of its invidious sex discrimination. Striking the sexual classification was

foreshadowed in Reed v. Reed. The statute upheld in Labine v. Vincent did not involve sexual classification. The sex discrimination issue was expressly reserved in Trimble.

The respective effective dates of their enacting legislation arbitrarily excluded Delynda from the benefits of a statutory paternity action under Chapter 13 of the Family Code and from heirship under the 1977 and 1979 amendments to §42 of the Probate Code. These effective dates were invalid under the Fourteenth Amendment.

Delynda's convincing proof of paternity in the present action should be viewed as satisfying the constitutional prerequisite to a Fourteenth Amendment remedy which is the equal of the statutory benefits of the Family and Probate Codes. It is repugnant to the Fourteenth Amendment that Delynda be

denied the statutory benefits accorded other children based either on these statutes' arbitrary effective dates or substantive terms. By virtue of the invidiousness of these statutory classifications, Delynda is entitled to a remedy in Equal Protection equal to the benefits which they deny her. Regarding the invidious probate provisions, Delynda's remedy is heirship. Regarding the Family Code, her Fourteenth Amendment remedies include full legitimation, heirship, and attorneys fees.

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## ARGUMENT

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### I.

THE ILLEGITIMACY CLASSIFICATION OF TEXAS PROBATE CODE §42, BY MAKING DELYNDAS STATUS OF BIRTH AN INSUPERABLE BAR TO HEIRSHIP FROM HER FATHER, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.



A. THE 1956 PROBATE CODE §42, WHICH THE LOWER COURT APPLIED TO DENY DELYNDA HEIRSHIP, WAS INDISTINGUISHABLE FROM THE ILLINOIS STATUTE STRUCK DOWN IN TRIMBLE V. GORDON, 430 U.S. 672 (1977).

The 1956 enactment of Probate Code §42 makes subsequent marriage of the parents the exclusive condition for paternal inheritance by an illegitimate child. Because the marriage of her parents was declared invalid, Delynda's inheritance was absolutely barred by this 1956 statute.

The court below correctly recognized that the insuperable legitimacy barrier of the 1956 enactment is invalid in light of Trimble v. Gordon, 430 U.S. 762. The 1956 §42 is indistinguishable from the statute in Trimble. The Texas Supreme Court in Davis v. Jones, 626 S.W.2d 303, 305 (Tex. 1982) wrote that "Before 1977, an illegitimate child could inherit, under the Texas statute, only from the mother." As this Court said in Lalli v. Lalli, 439 U.S. 257 (1978), at 273:

The Illinois statute in Trimble was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents.

Noting that Trimble required alternatives to marriage for establishing heirship from the father, Davis v. Jones went on to reach the obvious conclusion, 626 S.W.2d at 309: "[A]t the time of the death of his father in 1960, there were not 'suitable alternatives' under Trimble." Accord: Lovejoy v. Lillie, 569 S.w.2d 501, (Tex.Civ.App.--Tyler 1978 writ ref'd n.r.e.)

B. BECAUSE §40 AND §38 OF THE TEXAS PROBATE CODE WOULD GIVE DELYND A FULL INHERITANCE RIGHTS, THE LOWER COURT'S REFUSAL TO STRIKE DOWN THE UNCONSTITUTIONAL §42 WAS NECESSARY TO ITS JUDGMENT.

If §42 is set aside, two general provisions of the Probate Code control Delynda's heirship. The first of these, §40, provides that an adopted child shall

inherit "from and through its natural parent or parents" as well as from the adoptive parents. Probate Code §38 provides that the estate of a decedent shall descend to "his children and their descendants."

C. EVEN IF TRIMBLE V. GORDON WERE NOT APPLICABLE, IT WAS ERROR FOR THE LOWER COURT TO REFUSE TO STRIKE §42, BECAUSE THE STATUTE WAS UNCONSTITUTIONAL UNDER EQUAL PROTECTION PRECEDENTS WHICH THIS COURT HANDED DOWN BEFORE TRIMBLE.

In Solem v. Stumes, 104 S.Ct. 1338, (1984) this Court, upon finding the case in question not retroactive, remanded the appeal before it to the lower court for consideration under prior law.

In the case at hand, the lower court, having decided that Trimble did not apply, refused to apply any form of Equal Protection analysis to the 1956 §42 under prior law, even "insurmountable barrier" analysis:

[T]he equal protection argument fails as Trimble v. Gordon, . . . has not been applied retroactively where the father died before [Trimble] came down and suit was filed afterwards. Reed v. Campbell 682 S.W. 2d 700 (1984)

This holding does not account for the failure to apply illegitimacy cases which were handed down by this Court prior to Trimble. Under the Equal Protection analysis of these earlier cases, as well as in Trimble, §42 is invidious and void.

As set out more fully infra, these earlier cases unanimously struck down insurmountable barriers based merely on a status of illegitimate birth. The failure of the court below to apply the analysis of the earlier cases to the statute in this case was thus harmful error which, if Trimble were not applicable, was necessary to the result.

D. IT WAS ERROR FOR THE LOWER COURT TO USE A "TIME OF FILING" TEST INSTEAD OF THE NONRETROACTIVITY TEST OF CHEVRON V. HUSON.

1. THE LOWER COURT'S "TIME OF FILING" CLASSIFICATION IS UNCONSTITUTIONALLY OVER- AND UNDER-INCLUSIVE.

Under the "time of filing" test applied by the court below, claims are automatically allowed if filed before Trimble, and automatically dismissed if filed after.

As applied by the lower court, this test fails to distinguish between direct and collateral attack. If logically applied, claims brought before Trimble succeed against even closed estates. Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), judgment vacated 431 U.S. 911 (1977), on remand 560 S.W.2d 538 (1978) (briefed in appendix C of the Jurisdictional Statement, p. C.24). Conversely, applications for heirship

brought after Trimble, like Delynda's, are denied notwithstanding that the estate is still open and pending. Compton v. White, 266 Ark. 648, 587 S.W.2d 829 (Ark. 1979); Ford v. King, 268 Ark. 128, 594 S.W.2d 227 (Ark. 1980) (briefed in Appendix C of the Jurisdictional Statement, pp. C.27 - C.28).

The lower court's test is over-inclusive and jeopardizes the orderly settlement of estates. It is under-inclusive and arbitrarily denies Equal Protection.

Trimble requires that any state denials of heirship be necessary in order to preserve orderly probate. The over-and under-inclusive "time of filing" test fails to meet this requirement. The "time of filing" test actually jeopardizes orderly probate procedure and settlement of titles. Had the collateral attack in Winn v. Lackey, 618 S.W.2d 910 (Tex.Civ. App.--Eastland 1981, no writ), been

brought before Trimble, instead of after, the "time of filing" test would have automatically required reapportionment of the estate, notwithstanding that it had been closed. The "time of filing" test reached the correct result in Winn only because of the lucky chance that the collateral claim was filed after Trimble. In Winn, the land was under a contract for sale to third parties, the Lackeys. Clearly, the order provided by Probate Code §37 and §55 would have been disrupted by re-opening the estate for reapportionment under Trimble.

The denial of direct claims in open estates is, at the same time, under-inclusive. Delynda's claim was brought in her father's open estate, not by collateral attack. Thus none of the disruptiveness of the example above can be seen in her case. The estate was held in trust under §37 of the Probate Code. Under



Probate Code §55, no state interest in order or certainty had attached.

Reasonable reliance by third parties, such as the mineral lessees, is protected by these provisions, and by §188 of the Probate Code. Delynda's heirship could readily have been allowed, as it was claimed in the orderly process of probate itself.

The operation of the "time" test is also highly illogical: it denies Trimble claims because they are brought after Trimble. The explanation of this anomaly is that the "time" test is actually result-oriented, and based on an impermissible state interest in minimizing heirship under Trimble. The "time" test thus lacks the permissible state interest required by Trimble.

2. THE "TIME OF FILING" CLASSIFICATION DISCRIMINATES INVIDIOUSLY IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The "time of filing" test overlooks the legal and factual circumstances on which nonretroactivity of Trimble must rationally depend: 1) whether it was foreseeable that insurmountable legitimacy barriers might be struck down in probate; and 2) whether the estate was open or closed when the application for heirship was made.

This Court, exercising its authority to determine the retroactive effect of its own decisions, has fashioned a test which does take these considerations into account. Chevron v. Huson, 404 U.S. 97,

106-7 (1971), is the leading case setting forth this test:

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hannover Shoe, Inc. v. United Shoe Machinery Corp., supra, 392 U.S., at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see. e.g., Allen v. State Board of Elections, supra, 393 U.S., at 572, 89 S.Ct., at 835. Second, it has been stressed that "we must \* \* \* weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, 381 U.S., at 629, 85 S.Ct., at 1738. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, 395 U.S., at 706, 89 S.Ct., at 1900.

Unlike the "time" test, the Chevron test is rational, and relevant to legitimate governmental interests. Because the Fourteenth Amendment requires that litigants similarly situated be not denied the same treatment, a sufficient demonstration of Chevron-type factors is required to justify denial of the benefit of a decision of this Court in a state Court forum.

As this Court observed in holding its Fourth Amendment decisions retroactive where cases are reviewed directly,

And Justice Harlan's reasoning -- that principled decisionmaking and fairness to similarly situated petitioners requires application of a new rule to all cases pending on direct review -- is applicable with equal force to the situation presently before us.

Shea v. Louisiana, 105 S.Ct. 1065, 1070 (1985).

Delynda is situated similarly to Deta Mona Trimble, and her case is before the Court on direct review, not collateral

attack. No distinction between their cases justifies the treatment Delynda has suffered under the "time of filing" test. The "time" test excluded Delynda conclusively from Equal Protection relief without any reasonable relationship to a permissible state interest, in violation of the Fourteenth Amendment.

3. THE "TIME OF FILING" TEST VIOLATES THE PRINCIPLE OF STARE DECISIS.

Chevron protects the decisions of this Court from the vitiation suffered by Trimble at the hands of the court below. Chevron was an exercise of the authority of this Court over the scope of its decisions, and should not be ignored. It follows that the Chevron factors must be convincingly demonstrated before a state court is able to disregard controlling Supreme Court precedent.

E. THE THREE CHEVRON REQUIREMENTS FOR NONRETROACTIVITY CANNOT BE MET IN THIS CASE.

Chevron's test would apply Trimble to this case. First, Trimble was not sufficiently novel to trigger the Chevron threshold. Second, Trimble's purpose pleads eloquently for retroactive application. Third, the equities strongly favor retroactivity, in this open estate.

1. THE CHEVRON THRESHOLD OF NOVELTY IS NOT SATISFIED BY TRIMBLE, BECAUSE ITS HOLDING WAS CLEARLY FORESHADOWED.

The first Chevron requirement--an avulsive change in the law--is a threshold requirement for nonretroactivity. United States v. Johnson, 457 U.S. 537 (1982), at 550, n. 12.

The Trimble decision established a new principle of law, but not by overruling precedent. It did not expressly overrule any prior decision. Nor did it do so

implicitly. No prior decision had upheld an insurmountable probate barrier, and every decision expressly considering an insurmountable barrier in other contexts had struck it down.

The issue decided in Trimble was one of first impression, having been expressly reserved in the earlier probate case of Labine v. Vincent, 401 U.S. 532, 540 (1971). Determination of the Chevron threshold issue therefore turns on whether Trimble's holding was clearly foreshadowed.

The issue addressed by the foreshadowing prong of Chevron's nonretroactivity test is whether a litigant's reliance on a contrary result would have been justified. If it was foreseeable that this Court might decide Trimble as it did, then there can be no reliance equity which would justify disregard of the Fourteenth Amendment and the Trimble decision.



This Court has said in the criminal context in United States v. Johnson, 457 U.S. 537, 551 (1982), that:

In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, or disapproves a practice that this Court arguably has sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

In the civil context, the case of Hannover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), is cited by Chevron and is germane. There the Court ruled that its endorsement of a rule of antitrust law which had previously been

followed only by the Court of Appeals for the Second Circuit did not present a "new rule" for retroactivity purposes. The court noted that:

Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authorities or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation of monopoly, so long as they avoided direct exclusion of competitors or other predatory acts.

(footnotes omitted)

Trimble's holding was thrice clearly foreshadowed. First before Labine v. Vincent, second in the Labine opinion (and its dissent), and third after Labine, this Court made clear that an insurmountable

burden to intestate inheritance by illegitimate children might be struck down. This foreshadowing became increasingly clear in subsequent decisions of this Court, so that before Trimble it had become almost a question of when, rather than whether, the Court would strike down insurmountable barriers in probate.

#### BEFORE LABINE

Long before Labine, it was uncontroversial that the Fourteenth Amendment applied in the probate context. Pennsylvania v. Board of City Trusts of Philadelphia, 353 U.S. 230 (1957); Pennsylvania v. Brown, 392 F.2d 120 (3rd Cir. 1968). Indeed, it had been decided that even Congress could act in the probate area, notwithstanding a state's rights challenge. Trimble, 401 U.S. at 548, n. 16. This Court ruled, before Labine v. Vincent, 401 U.S. 532 (1971)

came down, that an illegitimate child is a "person" within the meaning of the Fourteenth Amendment. Levy v. Louisiana, 391 U.S. 68 (1968). It followed logically from these premises that illegitimate children could inherit in intestacy, notwithstanding contrary statutory classifications based on their condition of birth. Weber v. Anderson, 269 N.W.2d 892 (Minn. 1978).

#### THE LABINE MAJORITY

The Labine majority foreshadowed that an insurmountable illegitimacy classification might be struck down by taking pains to clarify that its ruling did not extend to such a barrier. The four-Justice dissent went further, unmistakably foreshadowing that such a burden would be struck down when presented.

The majority opinion in Labine, in sustaining the Louisiana statute, stressed the alternatives to marriage of the parents provided by that statute for heirship and support for the dependent illegitimate. Labine expressly clarified that its ruling did not extend to a classification which was insurmountable.

Labine wrote:

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child.

Labine v. Vincent 401 U.S. at 539.

Moreover, the fact that Labine would be distinguished in cases involving insurmountable barriers became clear very early. As this Court pointed out in Trimble, 430 U.S. 762, 773 (1977):

In Weber our distinction of Labine was based in part on the fact that no such alternatives existed, as state law prevented the acknowledgment of the children involved.

The Labine majority raised no doubts that the Fourteenth Amendment would apply in future cases of racial discrimination in probate. The doubt that it did raise was whether intermediate scrutiny classifications -- illegitimacy and sex -- would be applied in probate and similar areas. Its thrust was expressly directed at these two areas, each of which touches on "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property." 401 U.S. at 539. "To further strengthen and preserve family ties," said the court, "Louisiana regulates the disposition of property upon the death of a family man." Id.

Since the Labine majority expressly declined to rule whether an insurmountable barrier in probate would be struck down, it was not "clear past precedent" that such a burden would be sustained, as

required by the Chevron threshold. It was apparent that the Labine majority, if later confronted with a family-related barrier which was insurmountable, would be forced to choose between extending its "states rights" holding or applying the "insurmountable barrier" distinction which it emphasized so strongly in dicta.

#### THE LABINE DISSENT

Labine was decided over a strong four-Justice dissent. The dissent regarded the majority opinion as inconsistent with Levy, and an attempt to remove family-related classifications (i.e., sex and legitimacy) from the protection of the Fourteenth Amendment. To the extent that the dissent was correct, Labine can be credited with creating con-



fusion over the authority of Levy, not a clear rule within the meaning of Chevron.

And the fact that one additional vote would have made the dissent opinion the majority foreshadowed that even Labine's limited ruling sustaining the surmountable barrier before it might be subject to further analysis, to the extent that it conflicted with Levy.

#### THE EFFECT OF LABINE

After Labine, it was less clear than before that illegitimate children and women would continue to be regarded as "persons" within the meaning of the Fourteenth Amendment, at least in matters touching on family, property, and probate rights. But the issue of insurmountable barriers in probate had not been reached. The resolution of this issue in Trimble was "clearly foreshadowed" within the meaning of Chevron, since it had been

expressly reserved. Pending that resolution, reliance by litigants could not have been justified in an expectation that an insurmountable barrier would be upheld. Rather than reliance, a decision to act on an opinion about the outcome would have been risk-taking, because either resolution was possible.

While the Labine majority warned that insurmountable barriers might be struck down, the dissent foreshadowed that they would be. In light of the dissent, it appeared likely that, when the Court turned its attention to insurmountable probate barriers, there would be at least four votes for striking them down. A litigant who chose to take his chances in hopes that an insurmountable classification would escape Fourteenth Amendment scrutiny did so with fair warning that the issue might go the other way.

SUPREME COURT CASES AFTER LABINE

As intervening cases of this court removed much of the doubts thrown by Labine on Levy, the possibility grew ever more apparent that an insurmountable probate barrier, when considered by the Court, would indeed be set aside.

WEBER v. AETNA

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) adopted the reasoning of the Labine dissent and effectively removed any doubt which Labine might have cast on Levy's holding that an illegitimate child is a "person" under the Fourteenth Amendment.

Weber wrote the Labine's "insurmountable barrier" distinction into law. Finding that the burden in Weber was insurmountable, this Court struck it down. Read with Labine, this holding was one of the roots of the Equal Protection analysis

applied in Trimble: that the Illinois probate statute could not be sustained because it was insurmountable.

Rejecting Labine's language that state control of "family" matters was inviolate, Weber established that a state law attempting to penalize the innocent child was an illogical, unjust, and ineffectual way to enforce chastity. Weber thus began the second prong of the Equal Protection test applied in Trimble -- statutory classifications must be related to permissible state interests.

Weber held the claimant entitled to insurance payments upon a finding that she was the child of her deceased father. Weber thus demonstrated that the need to prove paternity after the father's death would not sustain an insurmountable state barrier.

REED v. REED

The doubt Labine cast on the application of intermediate scrutiny in probate was just as quickly laid to rest. Sex-based discrimination was struck down in the probate case of Reed v. Reed, 404 U.S. 71 (1971). Thus the invidiousness of the sexual discrimination of the Illinois and Texas statutes was squarely foreshadowed before Trimble.

GOMEZ v. PEREZ

In 1973, Gomez v. Perez, 409 U.S. 535 (1973), reiterated that insurmountable barriers would be struck down, and stressed that any problems of proof of paternity could not be made into an impenetrable barrier to shield otherwise invidious discrimination. Gomez also noted

that traditional Equal Protection scrutiny would be applied as well, and made it more explicit that the state could not deny illegitimate children the benefits accorded children generally.

MATHEWS v. LUCAS

In Mathews v. Lucas, 427 U.S. 495 (1976), this Court sustained the Social Security Act because it allowed illegitimate children to receive benefits by proving actual dependency. The Court noted, sua sponte, 427 U.S. at 515, n. 18:

Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellee's class in state intestacy laws is constitutionally prohibited, see Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), in which case appellees would be made eligible for benefits under § 216(h)(2)(A).

The Court continued to develop and refine these principles through Trimble and beyond. Never since Levy has the

Court sustained an insurmountable barrier based on illegitimacy.

#### LOWER COURT CASES

It was not lost on lower courts or on commentators that Labine's majority left the Fourteenth Amendment treatment of "insurmountable" probate barriers<sup>1</sup> an open question. Honest debate and difference of opinion flourished.

Prior to Trimble v. Gordon, lower courts had struck down statutory barriers to intestate inheritance by illegitimate children. A Fourteenth Amendment right to

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1. A long line of lower court cases consistently distinguished Labine on this basis when a statute posed an insurmountable barrier to the rights of illegitimates. E.g. Gentry v. U., 546 F.2d 343, 352 (Ct. Cl. 1976); Esakra v. Morton, 524 F.2d 9, 13, 15 (7th Cir. 1975); Davis v. Richardson, 342 F.Supp. 588, 592 (D. Conn. 1972), summarily aff'd 409 U.S. 1069 (1972).



heirship was recognized from the father<sup>1</sup> as well as the mother.<sup>2</sup>

On the strength of Weber, it was regarded as well-established in lower court cases before Trimble that any problems associated with proof of paternity after the father's death did not justify an insurmountable statutory bar based on illegitimacy in the context of compensation for loss of support upon the death of a father. Such statutory denials

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1. E.g., Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975); Will of Hoffman, 385 N.Y.S.2d 49 (N.Y. App. 1976); Green v. Woodard, 318 N.E.2d 397 (Ohio App. 1974).
  2. E.g., In re: Klingaman's Estate, 128 A.2d 311 (Del. 1957); In re: Estate of Jensen, 162 N.W.2d 861 (N.D. 1968).

had been struck down in federal<sup>1</sup> and state<sup>2</sup> courts.

The manifest illogic of treating heirship under Labine differently from support rights under Gomez was criticized in Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), judgment vacated 431 U.S. 911 (1977), on remand 560 S.W.2d 538 (1978).

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1. E.g., Davis v. Richardson, 342 F.Supp. 588 (D. Conn. 1972), summarily aff'd 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F.Supp. 1226 (D. Md. 1972), summarily aff'd 409 U.S. 1069 (1972); Gentry v. U.S., 546 F.2d 343 (Ct. Cl. 1976); Miller v. Laird, 349 F.Supp. 1034 (D.C. 1972); Williams v. Richardson, 347 F.Supp. 544 (W.D. N.C. 1972).
  2. E.g., Schmoll v. Creecy, 254 A.2d 525 (N.J. 1969); Yellow Cab Co. v. Industrial Comm'n, 247 N.E.2d 601 (Ill. 1969); In re: Estate of Johnson, 348 N.Y.S.2d 315 (Surr. Ct. 1973).

CONCLUSION: TRIMBLE WAS FORESHADOWED

Under Chevron, foreshadowing does not require that the result be foreordained. If it did, there would be no retroactive authority of any constitutional ruling of this Court which involved making a decision, rather than reaching a foregone conclusion.

It was plain before Trimble that the issue of insurmountable barriers in probate was ripe for resolution because it was expressly reserved in Labine. Moreover, the striking of an insurmountable barrier in Trimble was foreshadowed by the distinction in Labine itself. The subsequent cases of this Court uniformly distinguished Labine where the barrier was insuperable, applied intermediate Equal Protection scrutiny in probate, rejected any purported state interest in promoting chastity through punishing illegitimates, and found problems of posthumous proof of

paternity unpersuasive as a rationale for denying Equal Protection. Following the lead of this Court, state cases before and after Labine struck down insurmountable probate barriers under the Fourteenth Amendment.

Close reading of Trimble itself shows that it did not fashion new law, nor even distinguish Labine by a novel distinction. It is a scholarly opinion, rather than a landmark. After it was handed down, the stream of the law continued between the same banks as before. If a court were required to decide the case at hand viewing only the law up to the point of Trimble, there is no compelling reason to believe that it would not reach the same result. A different result would have been a retreat from Gomez, Weber, Mathews, and even Levy. Viewing all decisions of this Court except Trimble, the Trimble result would be required today if this

case came before the Court as one of first impression. Under these circumstances, no reliance on an opinion upholding insurmountable barriers in probate was justified. They had not been sustained in any other context touching on family life.

For a rational system of stare decisis, decisions of this Court should presumptively have retroactive effect. One exception should be permitted: where the prior law was clear, and the change unforeshadowed, so that a party was justified in reasonably relying on it. Only this kind of justified reliance can make retroactive application substantially inequitable, by causing the unjust hardship contemplated by Chevron. Only if the equities of justified reliance exceed the hardship caused by denying access to the new rule, and the purpose of the new rule itself, should retroactivity be abridged or denied.

2. RETROACTIVE APPLICATION WILL NOT IMPEDE TRIMBLE'S PURPOSE, BECAUSE THIS DIRECT APPEAL ARISES FROM AN APPLICATION IN OPEN PROBATE.

Trimble held invalid a classification based on illegitimacy because it cut more broadly than was required to serve the state interest of order in probate. The purpose of Trimble is thus one that speaks with unusual eloquence to the issue of retroactivity.

Trimble held the Illinois statute constitutionally flawed precisely because it excluded

at least some significant categories of illegitimate children of intestate men [whose] inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.

Lalli v. Lalli, 439 U.S. 257, 266 (1978).

As observed by the Eighth Circuit in Gross v. Harris, 664 F.2d 667 (8th Cir. 1981):

It is self-evident that the purpose of the Trimble decision was to prevent constitutionally impermissible discrimination against illegitimates. Retrospective application of Trimble would further the Trimble purpose.

The decision of the lower court ill served the purpose of Trimble. Its "time of filing" test drew a retroactivity distinction which, if drawn by a statute, would be invalid under Trimble. The purpose of Trimble demands that equal access to the protection of its rule be limited only by a classification substantially related to the need for order in probate.

Denying Trimble retroactive effect will not further the interest of stability and order in probate. Delynda's initial claim was filed in open and pending probate. This appeal is an integral part of



the judicial probate process. Retroactive application of Trimble will result in the estate's simply being closed by a judgment vesting title in all six of Prince Ricker's children, rather than in only five of them. The judgment will enjoy the same protection from collateral attack if Delynda is declared as an heir as it would otherwise. The state interest of orderly probate recognized by Texas statutes in closed estates (e.g., Probate Code §§37 and 55) are not disturbed by retroactive application here. Probate Code §188 additionally protects persons, such as the mineral lessees, who have already dealt with the administratrix in good faith.

The lower court cases which have applied Chevron or a Chevron-type analysis have held that Trimble's purpose is served by retroactive application to cases filed in open probate. These cases have

recognized final judgment as the event upon which the state interest in orderly probate attaches. Succession of Trosclair, 423 So.2d 745 (La.App. 1982); Estate of Sharp, 163 N.J. Super. 148, 377 A.2d 730 (N.J. Chancery. 1977), affirmed as modified 394 A.2d 381 (N.J. App. 1978); Marshall v. Marshall, 670 S.W.2d 213 (Tenn. 1984).

Even where the lower courts have not expressly applied a Chevron analysis, their results are consistent with the distinction of open versus closed estates.<sup>1</sup>

The purpose of Trimble would be hindered by denying the benefit of its ruling to Delynda, who brings this appeal from the denial of an application which she filed in the open probate of her father's estate.

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1. Cases that did not expressly apply a Chevron analysis have nonetheless ruled

3. APPELLEE'S CLAIM TO RIGHTS PASSIVELY ACQUIRED UNDER AN UNCONSTITUTIONAL STATUTE DOES NOT RAISE EQUITIES SUFFICIENT TO DEFEAT DELYNDIA'S INTERESTS UNDER THE FOURTEENTH AMENDMENT.

The burden of persuasion on the equities is on the party seeking to oppose the retroactive application of a decision of this Court. In Jiminez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), the court on remand applied the Chevron test and held Jiminez v. Weinberger, 417 U.S. 628 (1974) to be retroactive. Because it was the Secretary who opposed retroactive

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1. (cont'd)

Trimble retroactive when deciding an open estate, with only three exceptions, one being the case at hand. When the estate in question was closed, lower courts have held Trimble not to apply retroactively, with the sole exception of Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), judgment vacated 431 U.S. 911 (1977), on remand 560 S.W.2d 538 (1978), in which the Kentucky court apparently thought that the result was forced by the remand from this court. See generally, Jurisdictional Statement, Appendix C.

application of Jiminez, the Seventh Circuit held that

[I]t is the Secretary who must convince us that a retroactive application of Jiminez would produce 'substantial inequitable results.' Thus, unless the balance of the equities clearly tips in the Secretary's favor, the general rule of retroactivity must be applied.

523 F.2d at 703.

The purpose of the Chevron rule is to protect those who have "acted in justifiable reliance upon a subsequently overruled judicial decision" so as to avoid "unfairness and undue hardship." Marshall v. Marshall, 670 S.W.2d 213, 215 (Tenn. 1984).

In Chevron the plaintiff delayed filing suit, in possible reliance on the superceded doctrine of laches. It was held unfair to apply a statute of limitations to him retroactively. Such reliance

by litigants is absent in the case at bar, and recognizing Delynda's rights in the estate is not an "inequitable result" within the meaning of Chevron.

Passively acquiring rights under an unconstitutional statute in open probate is not the type of reliance which overcomes the presumption of retroactivity for Trimble. Cf. Marshall, 670 S.W.2d 213, 215.

Because there was no reliance in fact, the equities regarding disposition of property are no different in this case than they would have been if Trimble were decided four months before Prince Ricker's death, instead of four months afterward. Nor do the equities in the case at bar differ from those weighed by this Court in

reaching the Trimble decision. In Trimble, this Court divested Sherman Gordon's collateral relatives of the entire estate they would have received under the Illinois statute, vesting it in his child, Deta Mona Trimble. In the absence of actual reliance, there is no reason to exclude Delynda from an equal share with her father's other children in this case.

Any action Appellee might have taken in reliance on the unconstitutional 1956 enactment was unjustified because Delynda's father's estate was still open when Delynda applied for heirship. Probate Code §§37 and 55 guard against reliance prior to a final judgment declaring that all heirs and creditors have been located. Section 37 provides that the administrator holds the state, pending final judgment,

"in trust to be disposed of in accordance with the law." Good faith reliance by third parties is protected by Probate Code §188. Reliance on a final judgment is protected by Probate Code §55. As a result, all heirs are given fair notice that additional heirs or creditors may bring claims at any time before the estate is closed.

Even before illegitimate children were declared "persons" within the meaning of the Fourteenth Amendment, expectations of heirship were subject to claims by unknown marital heirs. In fact, Delynda's position in the state courts was that she was legitimate, and only alternatively that if the statutes denied her legitimacy and heirship, they violated the Equal Protection guarantee. Further,



as discussed in connection with the Chevron novelty threshold, Trimble's holding was foreshadowed, so that reliance in a contrary result would not have been justified.

Sharing the estate with Delynda is not a "hardship" within the meaning of Chevron. If such were the case no rule could be applied retroactively. The impact of the decision must be unfair to litigants by virtue of their justified reliance on a prior law in order to stay the ordinary operation of retroactivity. The purpose of Trimble is to allow nonmarital children an equal opportunity to share in their father's estate; this can hardly be outweighed by Appellee's desire to profit from the inequitable treatment which has historically been visited on illegitimates.

Moreover, Marshall v. Marshall, 670 S.W.2d 213, (Tenn. 1984) held that

"prospective only" application of an overruling decision should be limited to a case in which the hardship on the relying party outweighs the hardship on the party otherwise entitled to the benefit of the new rule. Marshall concluded that:

Since there are few cases where such rigorous demonstrations can be made, there should be few occasions when prospective overruling can justifiably displace the normal retroactive application of the overruling decision.

Id. at 215.

No reliance-related hardship of Appellees is presented by this case, so that that side of the scales is empty. On Delynda's side are the constitutional and societal interests in justice, which this Court recognized as deserving of deference in Trimble, and Delynda's right to a fair share of her father's estate.

The exclusion of nonmarital children from the rights granted children generally falls more heavily on them than the

recognition of their rights would fall on others. Even if reliance on changed law were not required, the duty imposed by the Fourteenth Amendment in this case falls more lightly on Delynda's half-siblings than the unconstitutional statute's burden fell on Delynda. The principal asset of Prince Ricker's estate is income from oil and gas leases. Delynda's share of the income from these leases is estimated to be \$2,500 per month. Under the discriminatory statute, Delynda has been deprived of the entire amount, as it has been divided among the other five children. Each of the other children has received an additional \$500 per month above the \$2,500 which he or she would have otherwise received, less any attorney's fees in carrying forward the defense of Delynda's claims.

In conclusion, Equal Protection scrutiny should be applied in this case under Trimble: (1) because Trimble was not novel; (2) because this claim was brought in an open estate, so that Trimble's purpose would be defeated by a refusal to apply it in this case; and (3) because the balance of the equities strongly favors retroactivity in the absence of reliance by Appellees.

## II.

TEXAS HEIRSHIP STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY INVIDIOUSLY DISCRIMINATING AGAINST SURVIVING MOTHERS ON THE BASIS OF THEIR SEX.

Gender discrimination is a distinct reason that the 1956 §42 violates Equal Protection. The issue is one of first impression, having been previously

reserved in Trimble v. Gordon, 430 U.S. 762, at 766.

Delynda has standing to urge the point because she has been harmed directly by the sex-based discrimination inherent in the 1956 enactment of §42 of the Texas Probate Code, and she has asserted invidious sex discrimination at every level of appeal in the state courts.

A. THE PROBATE STATUTES GIVE PREFERENCES TO FATHERS AND ACT TO THE HARM OF SURVIVING MOTHERS, ON THE BASIS OF THEIR SEX.

Parents have moral and legal duties to care for and support their children. Gomez v. Perez, 409 U.S. 535 (1973). When one parent dies, the Texas Probate Code gives preference and assistance in meeting these obligations to a surviving father but not to a surviving mother.

The statute provides that an illegitimate child may inherit from its mother

just as the legitimate child may, but that an illegitimate child may inherit from its father only if legitimated by a marriage. (Jurisdictional Statements Appendix B,2B.3)

A surviving father can expect to have the use of the child's share of the mother's estate in discharging his duties of care and support to the child. But if the surviving parent is female, the illegitimate child is barred from heirship and, unlike the surviving father, the mother is denied access to the estate in discharging her parental duties. This arbitrary denial significantly increases the burdens already borne by the surviving mother and is predicated solely on her sex.

B. THE PROBATE CODE'S GENDER-BASED CLASSIFICATIONS ARE NOT SUBSTANTIALLY RELATED TO AN IMPORTANT STATE INTEREST, ESPECIALLY IN LIGHT OF ADVANCES IN POST-MORTEM SCIENTIFIC EVIDENCE.

The Equal Protection test for gender-based classifications is set out in Caban v. Mohammed, 441 U.S. 380, 388 (1979):

Gender based distinctions must serve "important governmental objectives" and must be "substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause.

The importance of the state's objectives in probate--prevention of spurious claims and providing for orderly devolution of property--is not in dispute. The §42 discrimination against women, however, is not substantially related to achieving these objectives.

The relation between the §42 gender classification and these objectives lies



in the claim that paternity is more often difficult to prove than is maternity.

Difficulty in proving paternity, however, does not justify the wielding of a statutory meat axe which excludes all illegitimate children from paternal heirship.

The 1956 §42 is fatally flawed because it excludes heirship even where, as in the case at bar, proof problems do not exist and paternity has been favorably adjudicated.

Even where proof problems do exist, this Court has not allowed them to run roughshod over the Fourteenth Amendment right to Equal Protection. In Gomez v. Perez, 409 U.S. 535, this Court noted that proof of paternity problems cannot "be made into an impenetrable barrier that works to shield otherwise invidious

discrimination." Id. at 538. Since Gomez, strides in post-mortem blood testing have attenuated the relation between proof of paternity problems and governmental objectives in probate. See, e.g., Di Lonardo, "Genetic Identification of Disappeared Children," 5 The Am. J. of Forensic Med. and Pathology 339 (Dec. 1984). Mayr, "Paternity Testing With Unavailable Putative Father or Mother," in Inclusion Probabilities in Parentage Testing 373 (R.H. Walker ed. 1983).

In Trimble v. Gordon, 430 U.S. 762, proof problems were held to be insufficient justification for discrimination based on illegitimacy. The same problems cannot justify discrimination against certain classes of women--in this case, surviving mothers of illegitimates.

## III.

DELYNDA IS ENTITLED TO FULL LEGITIMATION, HEIRSHIP, AND ATTORNEY'S FEES AS THE CONSTITUTIONAL EQUIVALENT OF THE REMEDIES AVAILABLE UNDER THE FAMILY CODE PATERNITY ACTION, FROM WHICH SHE WAS INVIDIOUSLY EXCLUDED.

A. THE FAMILY CODE CHAPTER 13  
EFFECTIVE DATE IS UNCONSTITUTIONAL

The major state interest which could justify denying Delynda legitimation relief under Family Code Chapter 13 is difficulty in proof of paternity as related to orderly and efficient probate. This Court has recognized that such unequal treatment is not justified unless the law allows the illegitimate "a reasonable opportunity . . . to bring suit." Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Trimble v. Gordon, 430 U.S. 762, 774 (1977). Limitations on the rights of illegitimates to relief under Chapter 13 must be "substantially related to the state's interest in

avoiding litigation of stale or fraudulent claims." Mills, 99-100.

The effective date of Chapter 13 excludes all illegitimates born prior to September 1, 1975 from bringing suit under the statute and thus from the rights therein conferred. The denial of Chapter 13 relief to the class of illegitimates born prior to September 1, 1975 is unjustifiable under the "reasonable opportunity" and "substantial relation" tests as set out in Mills.

The rights and benefits conferred on some illegitimates by Chapter 13 are wholly denied to Delynda's class of illegitimates, who were born prior to its effective date. There is no statutory opportunity at all for that class of illegitimates to seek Chapter 13 relief. This

court has already recognized that proof of paternity problems cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

Gomez v. Perez, 409 U.S. 535, 538. The effective date of Chapter 13, and the consequent unequal treatment of illegitimates born prior to it, fails the "reasonable opportunity" test of Mills.

Neither does the effective date bear a substantial relation to the state interest of avoiding stale or fraudulent claims. The 1983 amendment to §13.01 retroactively allows a Chapter 13 action up to the second anniversary of the child's majority, indicating a legislative belief that paternity actions for children up to that age are worthy of adjudication. The case at bar was initiated in Delynda's

19th year. In making the 20-year limitation period expressly retroactive, the Texas legislature has disclaimed any state interest in preventing paternity claims such as Delynda's. Thus the unamended 1975 effective date of Chapter 13 stands to arbitrarily exclude claims which the legislature itself has deemed worthy of adjudication.

There is no reason to assume that a paternity claim of an illegitimate born in 1974 poses any more difficulty for adjudication than would the claim of an illegitimate born in 1976. The meat axe exclusion of the paternity actions of illegitimate children born prior to September 1, 1975, is wholly arbitrary. The statute's bar to Delynda's cogent proof of paternity, based solely on her

date of birth, bears no substantial relation to any permissible state interest.

For these reasons, the effective date exclusion violates the Equal Protection rights of illegitimates in Delynda's class.

B. THE REMEDY FOR THE UNCONSTITUTIONAL EFFECTIVE DATE IS A CONSTITUTIONALLY BASED GRANT OF RIGHTS EQUIVALENT TO THOSE AFFORDED IN CHAPTER 13, OR STRIKING THE UNCONSTITUTIONAL EFFECTIVE DATE.

In Wynn v. Wynn, 587 S.W.2d 790, (Tex. Civ. App.--Corpus Christi, 1979, no writ), a putative father attempted to avoid a claim for child support based on the effective date of Chapter 13, and the child's earlier birth. The court noted that this attempt

virtually ignores the United States Supreme Court decision of Gomez v. Perez, 409 U.S. 535... and every other involuntary paternity suit brought for the purpose of establishing the paternity of a child born prior to



September 1, 1975, in Texas after that decision.

Id. at 793.

Noting that the statutory procedure of Chapter 13 is "but a convenient method" to establish paternity, the specific provisions of which "apply only to children who were born on or after the effective date," Id. at 793, the court went on to affirm the trial court's finding of paternity. It held the child was entitled to support equivalent to that which is granted under Chapter 13, but that the action was a judicially fashioned remedy under the constitution "governed by common law principles since there are no express statutory provisions governing the situation." Wynn, 587 S.W.2d at 794.

An analogous remedy for the unconstitutional effective date in this case is the grant of rights equivalent to those denied by the Family Code, as was done with support rights under Gomez in Wynn. An alternate remedy would be to strike the effective date provision itself, allowing Chapter 13 rights to illegitimates born prior to September 1, 1975. Either remedy achieves the mandate of the Equal Protection Clause of the Fourteenth Amendment under the reasoning of Mills, which struck down the same statute's invidious one-year statute of limitations. The benefits of Chapter 13 cannot be denied by a classification which provides certain illegitimates no reasonable opportunity to attain its benefits, without a

substantial relation to relevant state interests.

C. DELYNDA'S CHAPTER 13 CLAIM IS APPROPRIATELY BROUGHT IN PROBATE.

As a matter of statutory construction, death of the father does not abate a Chapter 13 action. Were such the intention of the legislature, language to that effect would be found in the statute. In fact, the language of the statute contemplates proceeding in the absence of the father. In §13.02 the legislature predicates the order to submit to blood tests on the appearance of the father: "When the respondent appears in a paternity suit, the court shall [order tests] . . . ." The implication is that no such order need be made in the absence of the father's appearance.

Further, since 1983, the only time limit placed on a child's ability to bring suit is that she do so prior to the second anniversary of her majority. §13.01. This express limit negates an inconsistent implied limit on the action to the lifetime of the father.

Moreover, Texas courts have proceeded with paternity cases in the father's absence. Williams v. Texas Department of Human Resources, 619 S.W.2d 450 (Tex.App.-- Waco 1981, no writ).

1. JUDICIAL CONSTRUCTION  
REQUIRING THAT THIS ACTION BE MAINTAINED DURING HER FATHER'S LIFETIME WOULD DENY A REASONABLE OPPORTUNITY FOR DELYNDA'S CLAIM.

Under Mills, Chapter 13 must pass two tests. It must allow Delynda a reasonable opportunity to bring suit, and any state action truncating this opportunity must

bear a substantial relationship to a permissible interest. The court in Handley v. Schweiker, 697 F.2d 999, 1005, found that Mills compelled the conclusion that "the state interest in orderly estate settlement is insufficient to uphold the requirement that the paternity proceedings be maintained during the father's lifetime."

This holding applies in the case at bar. Delynda's opportunity to bring a Chapter 13 action during her father's lifetime was so beset with practical difficulties as to render it illusory, and virtually non-existent. Mills v. Habluetzel 456 U.S. 91, 97.

Delynda was adopted as a small child. Like many adopted children, she had no idea that she was illegitimate, nor had

she any reason to know. Thus, there was no way for her to be aware of any right, or need, to bring a lifetime action. But had Delynda known of the need, she still would have been afforded no reasonable opportunity for her paternity suit either by statute or by a Wynn action.

Delynda could not take advantage of the Chapter 13 action because of its effective date and because of the one- and four-year limitations periods. These provisions were formidable practical obstacles to her relief under Chapter 13.

Appellee suggests that during her father's lifetime Delynda could have sought Chapter 13 relief under a Wynn theory of constitutional equivalency. It would be unreasonable in the extreme to expect Delynda to have seen beyond the

prohibitive effective date of the 1975 statute to a constitutional claim of Equal Protection. If she had done so, however, practical considerations would have limited the possibility of even that action.

The Wynn action was predicated on the support right recognized in Gomez. But Delynda was adopted by Jerry Barker before the opinion in Gomez was handed down. Since, in Texas, adoption nullifies support obligations of the natural father, Gomez furnished no basis upon which to make a Wynn claim. The added benefit of Chapter 13 legitimation could not alone have caused Delynda to seek constitutional redress--as she was unaware that she was illegitimate.



For Delynda to have been aware of her status of birth, and of her constitutional right to the equivalent of Chapter 13 benefits, she would had to have been a constitutional scholar and a private detective, not an adopted fourteen-year-old child. She did not have a reasonable chance, as a child, to bring such an action.

Moreover, it is significant that Prince Ricker died on December 22, 1976--less than one year and three months after the effective date of Chapter 13, and less than the two-year period struck down in Pickett v. Brown for bringing a legitimation action. Delynda had recently turned 16 when her father died.

Given Delynda's belief that she was legitimate, the state of the law in 1976,

and the proximity of the enactment date of Chapter 13 to her father's death, it can hardly be claimed that Delynda had a reasonable time to petition for rights equivalent to those found in Chapter 13. For these reasons, if Delynda is denied a post-mortem paternity suit, she will have had no reasonable opportunity to exercise her Chapter 13 rights.

2. THERE IS NO SUBSTANTIAL  
RELATIONSHIP BETWEEN A LIFETIME  
REQUIREMENT AND A PERMISSIBLE STATE  
INTEREST.

The second test in Mills queries whether denying Delynda a post-mortem paternity suit bears a substantial relationship to a permissible state interest.

While it may be the case that some post-mortem paternity actions present substantial proof problems, a categorical

exclusion of such actions is unconstitutional because it denies certain illegitimizes the opportunity to pursue legitimation actions which are not only meritorious, but capable of being proven by clear and convincing evidence.

Delynda's action falls into this class.

Handley v. Schweiker is a strikingly similar case to the one at bar, and the reasoning of the court applies here.

That biological evidence, or the father's presence, is not essential to determine paternity is poignantly illustrated by this case. It comes to us after a judicial determination that the alleged father was, in fact, the real father, had been made by the administrative law judge and sustained by the federal district court judge,

697 F.2d 999, 1005-6 (1983).

A statutory construction which completely excludes post-mortem suits must fail constitutionally because it necessarily and arbitrarily excludes meritorious and provable claims, such as Delynda's.

Not only, then, is Chapter 13 construed on its own terms as allowing post-mortem paternity suits, but such construction is required under both the "reasonable opportunity" and "substantial relationship" Mills analyses. Delynda's suit is therefore appropriately decided in probate.

D. DELYNDAS HAS SATISFIED THE SOLE REQUIREMENT FOR A PATERNITY DECREE UNDER CHAPTER 13.

While due process requires notice of a claim to paternity, Prince Ricker had fair notice of Delynda's claim of his

paternity through her adoption proceedings. And notice has been given his estate in the present action.

Since the sole determination in a Chapter 13 action is whether or not the child is the daughter of the putative father, this action in probate has satisfied the sole requirement for a decree under a Chapter 13 paternity action. In Trimble v. Gordon it was determined that adjudication of a support case "should be equally sufficient to establish. . .[a] right to claim a. . . share of. . .[the] estate." 430 U.S. at 772.

A requirement to relitigate paternity under another caption or another statute was recognized as unreasonable in Handley, 697 F.2d, at 1006:

To require yet a third determination of the matter because resolution of the issue was subsumed in a trial which did not bear the title "paternity proceeding" would be to squander judicial efforts and to redundantly spiral appellant through a technical loophole.

E. DELYNDA IS DENIED EQUAL PROTECTION BY THE ARBITRARY EFFECTIVE DATE OF CHAPTER 13 AND IS ENTITLED TO RELIEF EQUIVALENT TO THAT GRANTED BY THE STATUTE: HEIRSHIP, LEGITIMATION, AND ATTORNEY'S FEES.

The statutory classification denying Delynda relief under Chapter 13 inviscerally discriminates against the class of illegitimates born prior to September 1, 1975. Delynda is therefore entitled to Equal Protection relief equivalent to the full measure of statutory relief available

under Chapter 13. Besides heirship under the 1979 probate amendment, Chapter 13 accords Delynda legitimate legal status, and attorneys' fees reasonably necessary to vindicate them.

The grant of legitimation under Chapter 13 is not discretionary. It is a matter of right upon a jury finding of actual paternity, which Delynda secured in the trial of this cause. The grant of attorney's fees under Chapter 13 §13.42(b) is discretionary. But the equities in this case favor the award of attorney's fees, because the entire course of this eight-year litigation has been an attempt by Appellee to deprive Delynda of her rights of heirship under a statute which Appellee admitted at the outset to be utterly unconstitutional. Delynda's



fees incurred in defense of her rights have been both reasonable and entirely necessary, and she requests this Court grant them in addition to legitimation and heirship, under Chapter 13.

#### IV.

DELYNDA IS ENTITLED TO LEGITIMATION AND HEIRSHIP FROM HER FATHER BECAUSE HER EXCLUSION FROM THE BENEFITS OF VOLUNTARY LEGITIMATION UNDER THE FAMILY CODE WAS INVIDIOUS.

In Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982) the court considered the constitutionality of a state denial of heirship. It found that the illegitimate child was entitled to survivor's benefits because the state law violated equal protection under Trimble v. Gordon 430 U.S. at 771-72 and Lalli v. Lalli, 439 U.S. at 271, 275-76. The Cox plaintiff was the minor son of James Appling, deceased. Georgia law at that time denied all heirship to illegitimate children, but

provided for legitimation by marriage of the parents or by voluntary petition by the father. Mr. Appling did not marry the mother of his son nor petition to make him legitimate. The Fifth Circuit held that this opportunity for legitimation had been too restrictive, and that the child would have a right to inherit under the Fourteenth Amendment. It therefore held him entitled to survivors benefits.

Cox is in line with decisions of this Court which have made it clear that a statutory opportunity for the child to legitimate himself must provide him a "reasonable opportunity" to bring an action. Mills v. Habluetzel 456 U.S. 91 (1982).

The state of the law in Texas after the enactment of the voluntary legitima-

tion statute in response to Gomez mirrors exactly the law struck down in Cox. The purely voluntary legitimation action was not a "sufficient opportunity" for Delynda to legitimate herself, nor was it reasonably related to the relevant state interests, when she actually proved paternity by convincing evidence at trial. Delynda's exclusion from legitimate status and according heirship was thus invidious, and she must be granted equivalent legitimation under the Fourteenth Amendment.

V.

THE CLASSIFICATIONS EXCLUDING DELYNDIA FROM HEIRSHIP UNDER THE 1977 AND 1979 AMENDMENTS TO §42 OF THE PROBATE CODE WERE INVIDIOUS AND INVALID.

The 1956 Probate Code §42 was twice amended before trial. The legislature made the amendments effective May 28, 1977, and August 27, 1979, rather than

making them retroactively available to estates which had not yet closed. In treating Delynda's heirship as though the amendments had never been enacted, the lower court was thus correct under state statutes.

By denying retroactive application of the amendments to estates of men who had died earlier, but which were still open and pending at the amendments' effective dates, the legislature unconstitutionally discriminated against nonmarital children making claims in those estates. Upon denying Delynda's foregoing claims for Equal Protection relief, the lower court should have looked past the amendments' unconstitutional effective dates. Viewing the amendments as being in force when Delynda's father died, it should have then

determined whether Delynda was entitled to any relief under their substantive provisions. In so viewing them, it is clear that Delynda is entitled to the benefit of the heirship granted by the amendments, since the classifications excluding her from the Family Code legitimation procedures referenced by the amendments was invidious and void.

The 1977 amendment granted heirship only to persons whose fathers had, on a purely voluntary basis, legitimated them by executing a sworn acknowledgment of paternity under the Family Code. Other proof of paternity, including even an adjudication of paternity with the father as a party, was irrelevant to the 1977 amendment. There was no constitutionally sufficient reason for this refusal to con-

sider any alternative evidence of paternity. The exclusion denied any reasonable opportunity to the benefits of legitimation under the voluntary Family Code procedure. At trial, Delynda proved paternity in this case by convincing evidence which was disregarded under the statute. Delynda's adoption meant that her natural father would have been even less likely to legitimate her than in the case of the father of an unadopted child. And through the adoption, Delynda's father was formally advised, during his own lifetime, of the claim that Delynda was his. Looking past the unconstitutional requirement of legitimation by a voluntary sworn acknowledgment, Delynda was therefore entitled to legitimation equivalent to that granted by the voluntary procedure and to the relief granted or incorporated by reference in the 1977 amendment.

The 1979 amendment granted heirship to persons who were "legitimated by a court decree as provided by Chapter 13 of the Family Code." Since the 1979 amendment incorporated the provisions of Chapter 13 of the Family Code, its constitutionality must be determined by reference to those provisions.

The legislature provided an effective date of September 1, 1975, for Chapter 13 of the Family Code. Born prior to Chapter 13's effective date, Delynda was unable to be legitimated through Chapter 13 procedures. The 1979 amendment to the Probate Code thus unconstitutionally discriminated against illegitimates born prior to September 1, 1975, by providing no alternative to the Chapter 13 legitimation action as a means of sharing in their fathers' estates. Delynda proved her relationship to her father by clear and



convincing evidence, such as the invalid marriage of her parents and the decision of her father, upon receiving the papers, to allow her adoption. This proof was irrelevant under the 1979 amendment, which therefore provided Delynda no reasonable opportunity to bring suit and was unrelated to the need for cogent proof in probate. Delynda is therefore entitled to relief equivalent to that granted by or incorporated by reference in, the 1979 amendment, including the legitimation, heirship, and attorney's fees provided by Chapter 13.

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REQUEST FOR RELIEF

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Wherefore, Delynda requests this Court to reverse the judgment of the Texas Court of Appeals, and enter an order rendering judgment for Delynda as requested herein; or in the alternative, to issue its Mandate that the trial court enter an order:

1. Granting Delynda's Application for Heirship in her father's estate under the Fourteenth Amendment;

2. Awarding her an amount equal to the distributions of her father's estate which have already been made to her father's other heirs, as well as an equal share of all future distributions, pursuant to §§40 and 38, Texas Probate Code;

3. Declaring that Delynda is the legitimate child of her natural father, Prince Rupert Ricker, pursuant to Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§37.005 and 37.003;

4. Awarding her prejudgment interest on her share of past distributions, which has been delayed during the eight-year course of this litigation; and postjudgment interest during any further delay after this Court's judgment, as provided by Cavner v. Quality Control Parking, Inc., 697 S.W.2d 549 (Tex. 1985);

5. Awarding her the reasonable and necessary attorney's fees incurred in securing the declaration of her rights herein, as provided by the Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§37.005 and

37.009; and by the Fourteenth Amendment as the equivalent of the fees provided by Family Code §13.42(b); and

6. Taxing the costs in this matter to Appellee.

Appellant prays for such other and further relief, both in law and at equity, to which she may be entitled.

Respectfully submitted,

---

R. Stephen McNally,  
Counsel for Appellant  
P.O. Box 1586,  
Austin Texas, 78767-1586  
(512) 474-1397

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The assistance of Mark A. Smith and James C. Thompson in preparing this brief is gratefully acknowledged.

No. 85-755

Supreme Court, U.S.

FILED

MAR 5 1986

In The  
**Supreme Court of the United States**  
October Term, 1985

DELYNDA ANN RICKER BARKER REED,  
*Appellant,*

PRINCESS ANN RICKER CAMPBELL,  
INDIVIDUALLY, AND AS ADMINISTRATRIX  
OF THE ESTATE OF PRINCE RUPERT RICKER,  
DECEASED

*Appellee.*

On Appeal From The Court Of Appeals For The Eighth  
Supreme Judicial District of Texas

**BRIEF FOR APPELLEE**

PAUL McCOLLUM

*Counsel of Record*

KATHLEEN M. McCULLOCH

SHAFFER, DAVIS, McCOLLUM,

ASHLEY, O'LEARY & STOKER, INC.

P. O. Drawer 1552

Odessa, Texas 79760

(915) 332-0893

FLETCHER N. BALDWIN, JR.

Holland Law Center

University of Florida

Gainesville, Florida 32611

*Attorneys for Appellee*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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### QUESTIONS PRESENTED

1. Whether Appellant's action should be dismissed because the appeal was improvidently granted.
2. Whether the present appeal should be dismissed for want of a substantial federal question.
3. Whether adjudication on the merits would constitute issuance of an advisory opinion which is forbidden under Article III to the United States Constitution.
4. Whether the United States Constitution or *Trimble v. Gordon* impact upon the state law with respect to the question of retroactivity.
5. Whether an illegitimate child who fails to inherit under the three possible methods of legitimation statutorily provided can claim an equal protection violation when the legislation in question is substantially related to a legitimate state goal.

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CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

The Fourteenth Amendment, § 1, to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cited by this Appellee, but not cited by Appellant, in this brief, is Texas Family Code Annotated, Ch. 12, § 12.02 (b) effective September 1, 1975:

12.02. Relation of Child to Father

- (a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.
- (b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.
- (c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this Code.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Eighth Supreme Judicial District, is reported at 682 S.W.2d 697 (Tex. App. 1984).

STATEMENT

Appellant seeks by this appeal entitlement as an illegitimate child to one-sixth of the Estate of Prince Rupert Ricker, Deceased.



On December 22, 1976, Prince Ricker died a judicially declared non compos mentis and intestate.<sup>1</sup> Appellant was eighteen years of age.<sup>2</sup>

On February 16, 1978, Appellant filed in the estate a Notice of Heirship and Claim for \$21,600.00 in past child support.<sup>3</sup> In June 1958, she filed an independent suit in the District Court on her child support claim.<sup>4</sup> And, on February 27, 1979 she filed in the probate court an Application to Determine Heirship.<sup>5</sup> All actions were consolidated and transferred to the District Court for trial.<sup>6</sup>

At trial, Appellant claimed to be the legitimate child of Prince Ricker by virtue of the purported 1957 Mexican marriage of Appellant's mother, Annabel Boutwell, and the deceased Prince Ricker.<sup>7</sup> The purported Mexican marriage was void, because at the time of the alleged marriage, Prince Ricker was already lawfully married to Alice Rosemary Lawson, his first wife.<sup>8</sup> Appellant alleged that upon the divorce of Prince Ricker and Alice Rosemary Lawson on February 28, 1958, a common law or putative marriage arose.<sup>9</sup>

Annabel Boutwell testified that she and Prince Ricker were married in Juarez, Mexico before witnesses, although she did not know any of the witnesses present and lost the marriage certificate.<sup>10</sup>

1. For purposes of this appeal the following abbreviations mean:

- "JA"—Joint Appendix
- "D.Ex."—Defendant's (Appellee's) Exhibit
- "P.Ex."—Plaintiff's (Appellant's) Exhibit
- "R"—Reference to the record

JA 4-9; D.Ex. 17, R. 809-810; D.Ex. 18, R. 810; D.Ex. 33, 34; R. 828.

2. P.Ex. 1, R.9.

3. JA 11, 13.

4. JA 15.

5. JA 22.

6. JA 33.

7. JA 15, 53.

8. D.Ex. 36, R. 834; P.Ex. 5, R. 108, 209; R. 37-38, 71-72, 787-788.

9. JA 533.

10. R. 37-39, 55, 89.

Certified Certificates of Nonexistence of Records from the Civil Registries of Zaragosa and Ciudad Juarez, Chihuahua, Mexico showed no marriage.<sup>11</sup>

Contrary to Appellant's statement that the "couple kept two households" (Appellant's Brief, p. 8, *id.* 1), Annabel Boutwell continued to live with her mother in Big Spring, Texas and Prince Ricker kept his residence in Stanton, Texas where he was teaching school.<sup>12</sup> Annabel Boutwell testified that they would occasionally "live" together at the different addresses.<sup>13</sup> Annabel Boutwell's maid testified that on some Monday mornings she would find his laundry.<sup>14</sup> Prince Ricker kept some odds and ends in Big Spring and kept some clothes and other personal belongings in Stanton.<sup>15</sup>

A search of the 1957-1958 school records failed to reveal whether or not Prince Ricker was single or married, but a teaching colleague was under the impression he was single.<sup>16</sup>

Prince Ricker told his last wife, Marilyn Watts, in the presence of his father, that he never married Annabel Boutwell.<sup>17</sup>

No documentary evidence was produced at trial to substantiate Annabel Boutwell's claims that she and Prince Ricker held themselves out to the public as husband and wife.<sup>18</sup>

Prince Ricker and his first wife, Rosemary Lawson, were divorced February 28, 1958, two daughters being born of that marriage being Appellee, Princess Ann Ricker Campbell and Rosemary Jane Ricker Farrell.<sup>19</sup>

Annabel Boutwell never filed a petition for divorce,<sup>20</sup> a suit for child support, or to establish the paternity of

11. D.Ex. 31, R. 816-822; R. 858-860.

12. R. 37, 40, 72-75.

13. R. 74-75.

14. R. 120-121, 124-125.

15. R. 60, 885-886.

16. R. 775-781.

17. R. 611, 615, 635.

18. R. 44-45, 47, 50.

19. P.Ex. 5, R. 106, 108, 209.

20. R. 76-77, 99-100.

Prince Ricker.<sup>21</sup> No evidence was produced of any blood or tissue samples performed to establish the paternity of Prince Ricker to Appellant.

On October 20, 1958, Prince Ricker married Jeri Laverne.<sup>22</sup>

On October 27, 1958, four days before Appellant's birth, Annabel Boutwell went to Court and changed her name to "Ricker."<sup>23</sup>

Appellant was born November 1, 1958.<sup>24</sup>

Contrary to Appellant's contention that because Prince Ricker's name appeared on Appellant's birth certificate, clear and convincing evidence of paternity was established (Jurisdictional Statement, p. 6, n. 1), Reagan County Memorial Hospital's Director of Nurses testified it is usually the mother who fills out the information as "informant" in regard to the birth of a child. Appellant's birth certificate shows only Annabel Boutwell "Ricker" as informant, constituting no evidence that Prince Ricker acquiesced or even had knowledge of her actions.<sup>25</sup> Prince Ricker was then legally married to another woman, Jeri Laverne.

Three months after Appellant's birth, Annabel Boutwell married Jerry Barker, who adopted Appellant in 1965.<sup>26</sup>

After Prince Ricker and Jeri Laverne divorced on January 4, 1960, he married Marilyn Watts on April 8, 1960. Three children were born of this marriage, being Prince Jr., Brett and Mark Ricker. Prince Ricker and Marilyn Watts lived together for seven years until their divorce on March 8, 1967.<sup>27</sup>

Marilyn Watts first learned of Annabel Boutwell about one month prior to her marriage to Prince Ricker when they went to inform Prince's father, Rupert P. Rick-

21. R.88-89, 97-98.

22. D.Ex. 20, R. 813.

23. P.Ex. 1, R. 3; D.Ex. 13, R. 803-805.

24. P.Ex. 1, R. 3; D.Ex. 12, R. 57, 80.

25. R. 709-716.

26. P.Ex. 6, R. 211; D.Ex. 12, R. 803; R. 59.

27. D.Ex. 20, R. 813; R. 608, 612; 616.

er, of their impending marriage.<sup>28</sup> She learned that Annabel Boutwell had changed her name to "Ricker" and it was a source of embarrassment to the family.<sup>29</sup> Prince Ricker told them that he did not marry Annabel Boutwell.<sup>30</sup>

Prince Ricker was an unreconstructed alcoholic. *Reed v. Campbell*, 682 S.W.2d 697, 698 (Tex.App. 1984). Sixteen admissions to hospitals and mental institutions were admitted from 1967 until his death, evidencing his chronic alcoholism, delusions, dementia, organic brain damage and related problems.<sup>31</sup>

A psychiatrist, Dr. Hornisher, met Prince Ricker in 1966 and treated him until 1975.<sup>32</sup> In 1967, the doctor diagnosed severe cirrhosis of the liver and organic brain disease and wrote the Judge that it was in Prince Ricker's best interest that he be committed.<sup>33</sup> In 1968, he requested the appointment of a guardian, and Prince Ricker was committed again in 1969.<sup>34</sup>

About seven months prior to giving his deposition, Dr. Hornisher testified Annabel Boutwell and her lawyer came to see him wanting to know more about Prince Ricker. Annabel Boutwell claimed that she had been married to Prince Ricker at one time. That meeting was the first he ever heard of her.<sup>35</sup>

Cinderette McDaniel, Prince Ricker's sister, instituted proceedings to have Prince Ricker declared non compos mentis to preserve his estate. Prince Ricker was judicially declared non compos mentis on July 17, 1968 and a tempo-

28. R. 610.

29. R. 612-615.

30. R. 611, 615, 635.

31. D.Ex. 22-30; R. 815-816.

32. R. 523, 531, 593.

33. R. 563-566. Reginald McDaniel, a physician and Prince Ricker's brother-in-law, testified he also noted Korsakoff's syndrome in Prince Ricker as early as 1966 or 1967, a condition associated with chronic alcoholism, manifested by memory delusions, dementia, hallucinations, confabulations and peripheral neuropathy due to brain atrophy and toxic effects of alcohol. R. 459, 461, 483.

34. R. 544, 571, 584.

35. R. 594-595, 599-600.

rary guardianship over his person and estate was appointed for one year.<sup>36</sup> The guardianship continued through his death.<sup>37</sup> Although an attempt was made in 1975 to remove the guardianship, a jury found him incompetent.<sup>38</sup>

Herb Gehring, manager of the La Posta Motor Lodge of El Paso, Texas, where Prince Ricker had become an "ultra permanent guest", testified Prince Ricker was unable to function, was unaware of the reality of his surroundings, and could not care for himself.<sup>39</sup> Contradicting Annabel Boutwell's testimony that she last saw Prince Ricker in 1968 or 1970 when he got out of the Big Spring State Hospital mental facility and who had seen him only once prior to that time in 1959 or 1960, Gehring testified that Annabel Boutwell and Appellant came to visit in the Spring, 1976 and August, 1976. They would stay a good portion of each day with Prince Ricker. After their first visit, Gehring noticed Appellant and her mother left a small color photograph of Appellant stuck in the mirror of Prince Ricker's room.<sup>40</sup>

Appellant relies upon the testimony of Armando Mata Martel, an El Paso cab driver who chauffeured Prince Ricker, as evidence of Prince Ricker's recognition of Appellant as his child when he sought his advice on whether to allow Appellant's adoption by Jerry Barker. The evidence showed that he never even met the cab driver until after Appellant had already been adopted.<sup>41</sup> (Appellant's Brief, pp. 8, 9, 11).

Appellant argues that Rube Ricker, Prince Ricker's mother, testified that Annabel Boutwell came to her when she was pregnant and told Rube Ricker that the father was Prince Ricker. Appellant ignores Rube Ricker's response

36. D.Ex. 18, R. 810; R. 410-411.

37. D.Ex. 33, 34, R. 822, 828.

38. D.Ex. 34, R. 822-828.

39. R. 742-747, R. 749-756.

40. R. 90-91, 757-760.

41. R. 138-141, 150.

in the record when she said "Well, it is your word against his." (Appellant's Brief, p. 8, n. 1).<sup>42</sup>

As evidence of paternity, Appellant relies on a conversation that took place in the home of Cinderette and Reginald McDaniel after Prince Ricker's discharge from Hazelden Clinic a few months prior to his death. (Appellant's Brief, pp. 8-9) In the rehabilitative book furnished by the clinic, Prince Ricker wrote, "Number 2, I was the father, reasonably sure, of a daughter out of wedlock. I justified it in the usual manner. She put it in the newspaper. I was conning Dad. There was an easier way." Cinderette then said "You mean Annabel."<sup>43</sup> Reginald McDaniel said of the conversation, "my wife was running the conservation."<sup>44</sup>

After Prince Ricker's death, Cinderette McDaniel filed an Affidavit of Heirship in the Deed Records of Reagan County, stating Prince Ricker had been married three times during his life; to Rosemary Lawson, Jeri Laverne and Marilyn Watts; that five children were born, being Princess Ann, Rosemary Jane, Prince Jr., Brett and Mark; and that Prince Ricker had no deceased children and had "never adopted any children or cared for any children . . . other than the natural children named above."<sup>45</sup>

Annabel Boutwell never filed suit to establish the paternity of Prince Ricker to Appellant during his lifetime.<sup>46</sup> Eight years elapsed from the time of Appellant's birth and her adoption by Jerry Barker; however, no voluntary or involuntary proceedings were initiated to establish paternity.<sup>47</sup>

## SUMMARY OF ARGUMENT

1. This appeal has been improvidently granted and must be dismissed. The conclusions established, *infra* demon-

42. R. 372, 377.

43. P.Ex. 7, R. 416, 432; R. 409, 426-427.

44. R. 474.

45. D.Ex. 16, R. 807.

46. R. 83-89, 97-98.

47. R. 97-98.



strate that Appellant has no standing. It is further established that to actually grant the relief she seeks would require this court to overturn the findings of the state court, which is not within the power of this tribunal to do under the intermediate scrutiny standard. Further reflection establishes that adjudication on the merits would be an advisory opinion, since the Texas Probate Code already complies with *Trimble*.

Appellant is fully sensitive to the Court's concerns in this area of adjudicating the constitutional rights of illegitimate children. In consideration of those concerns, it is most respectfully argued that this case is "an unwise vehicle for exercising the 'gravest and most delicate' function that this Court is called upon to perform[.]" *New York v. Uplinger*, — U.S. —, 104 S.Ct. —, 81 L.Ed.2d 201, 206 (1984) (Stevens, J., concurring).

2. Assuming that this court decides to entertain the merits of this claim, *Trimble v. Gordon*, 430 U.S. 762 (1977) should not be applied retroactively. As argued, there are nine factors that render this case outside the ambit of any decided by this Court. In each of this Court's previous adjudications on the rights of illegitimates, there was evidence to believe there was a familiar relationship between the illegitimate child and the father. Here, the evidence is to the contrary.

A canvassing of this Court's opinions shows solid evidence of paternity that is lacking in this case. See e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978); *Gomez v. Perez*, 409 U.S. 535, 536 (1972) (per curiam); *Caban v. Mohammed*, 441 U.S. 380 (1978); *Parham v. Hughes*, 441 U.S. 347, 349 (1978); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1971); *United States v. Clark*, 445 U.S. 23 (1979); and *Mathews v. Lucas*, 427 U.S. 495, 497 (1975).

In almost every case in which this Court has adjudicated the rights of illegitimate children under the Equal Protection Clause there was clear and convincing proof of paternity, both de facto and de jure. *Labine v. Vincent*, 401 U.S. 532, 533 (1971), that being the opposite of the case in chief.

## ARGUMENT

### I

#### APPELLANT'S ACTION SHOULD BE DISMISSED BECAUSE THE APPEAL WAS IMPROVIDENTLY GRANTED.

##### A. APPELLANT LACKS STANDING TO ASSERT THE RIGHTS OF THIRD PARTIES.

With all due respect, Appellant has no standing to assert the many and varied claims combined under the equal protection clause of the Fourteenth Amendment which she continues to press before this Court.

Appellant does not claim that the construction of state law or finding of fact in the present case by the state court impacts upon her because she is female, or a member of any other suspect classification. Any illegitimate child in circumstances like the Appellant would be treated in exactly the same fashion, regardless of race, gender, religion, or other factor.

It is only because of the gender of her purported *parent* that Appellant claims injury. It is argued by the Appellant, that the gender of her putative *parent* prevents her from inheriting. Indeed, Appellant argues:

In every brief and motion for rehearing filed . . . she has raised the Fourteenth Amendment issue [ ] presented here . . . (3) that the denial of heirship discriminated invidiously based on the sex of her deceased parent.<sup>48</sup> (Jurisdictional Statement of Appellant, pp. 11-12).

48. See also Appellant's Jurisdictional Statement at p. ii, under "SEXUAL CLASSIFICATION QUESTIONS,"

(5) Where maternal heirship requires only a preponderance of the evidence, while paternal heirship is not allowed [sic], is this distinction permissible?"

See also Appellant's Jurisdictional Statement, at p.13, where in affirming the trial court, the appellate court "did not directly address the validity of the sexual basis of the statutory classification." (referring to *Reed v. Campbell*, 682 S.W.2d 697 (Tex. App. 1984, writ ref'd n.r.e.). See also, Appellant's Jurisdictional Statement, at p.14, "The third part [of this section] discusses the substance of the blanket denial of heirship based on the sex of the decedent."

As is evident, Appellant's entire claim is based upon a gender-based differentiation impacting upon *her parent(s)*, not directly herself.

Since it is the gender of the parent at issue that controls the outcome of this case, it is in fact the parent who is directly impacted upon by the sex-based differentiation enacted by the Texas Legislature.

Under the present facts, it would be impossible for the father to raise this cause of action (the situation arises only upon his death, intestate), therefore Appellant assumes that she, as the purported illegitimate child of a father who died intestate, is the one to challenge the Texas statute.

However, it is clear that if such a claim is to be prosecuted,<sup>49</sup> the proper representative in his stead is not his illegitimate child, but the administratrix of his estate. The representative of his estate, into which devolved his rights and obligations upon his death, is the proper person to press his rights in his stead. The illegitimate child is not the proper representative of his interests.

Since the reality is, and Appellant concedes, that this appeal is governed by the impact of a gender based classification upon a third party, her parent, she has no standing to prosecute this appeal. *Warth v. Seldin*, 422 U.S. 490, 499 (1975): "[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Since it is evident Appellant bases her claim on the right or interest of a third party, and is not the proper representative of that party, this appeal should be dismissed based upon the principles of *Warth*.

Appellant also presses her claim based upon the alleged injury inflicted upon *her mother* by the Texas inheritance practices then in effect.

The sexually discriminatory aspect of the classifications applied to defeat Delynda's heirship is a second

49. Indeed, Appellant herself acknowledges that the estate of the man whom she claims is her father is the proper representative of his interests. "[N]otice has been given his estate in the present action." (Appellant's Brief on the Merits, p. 88).

and independent reason that they are repugnant to the Fourteenth Amendment. The bastardy classifications imposed on Delynda's heirship are subject to a gender-based subclassification. Surviving mothers of illegitimate children are disadvantaged by the continuing denial of paternal inheritance to an illegitimate child, while full maternal inheritance rights have been allowed. This limitation on illegitimacy disinheritance gives a surviving father the benefit of the mother's estate when discharging his duty to support his non-marital child. Based solely on her sex, the statute continues to deny a surviving mother this benefit.

(Brief of Appellant, pp. 17-18).

Appellant's natural mother, Annabel Boutwell Barker is alive and well at the time of this appeal. Appellant has not alleged,<sup>50</sup> much less proven, that this claimed discrimination against her mother has injured her. It is beyond dispute that Appellant has no standing to appeal the judgment of the court below based upon this contention. See *Warth v. Seldin*, *supra* at 499. *Heald v. District of Columbia*, 259 U.S. 114 (1921) is also instructive:

It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show he is within the class of persons

50. Appellant claims, "Delynda has standing to urge the point because she has been harmed directly by the sex based discrimination inherent in the 1956 enactment of § 42 of the Texas Probate Code, and she has asserted invidious sex discrimination at every level of appeal in the state courts." (Appellant's Brief on the Merits, p.67). It is submitted that declarations of "discrimination" asserted at whatever level are an irrelevancy in a determination of whether Appellant has standing before this Court. It is obvious Appellant is confusing standing with preservation. It is further obvious that since Appellant has demonstrated no injury of any kind from the discrimination that she claims is directed against mothers of illegitimates, and fails to allege that she is a member of the class, she has no standing to press the point here. Appellant cannot substantiate the claim that she has been "harmed directly."

"It is the responsibility of the complainant to clearly allege facts demonstrating that he is the proper party to invoke judicial resolution of the dispute and exercise of the court's remedial powers." *Warth v. Seldin*, *supra*, at 517-518.

with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. *Id.* at 123.

(Mr. Justice Brandeis, speaking for the unanimous Court).

*Accord*, *Supervisors v. Stanley*, 105 U.S. 305, 311 (1881); *Hatch v. Reardon*, 204 U.S. 152, 160 (1906); *Citizens National Bank v. Kentucky*, 217 U.S. 443, 453 (1909); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544 (1914); *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 530 (1916); *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 149 (1918); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Gladstone Realators v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Coleman v. Miller*, 307 U.S. 433, 464 (1938); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1961); and *Schlesinger v. Reservists to Stop the War*, 413 U.S. 208, 216 (1974).

Appellant's claim as to the impact on mothers of illegitimates is at most a generalized complaint. *Flast v. Cohen*, 392 U.S. 83 (1968); *Fairchild v. Hughes*, 258 U.S. 126 (1921); *Frothingham v. Mellon*, 262 U.S. 447 (1922). Appellant demonstrates no injury, and is not within the class whose rights she seeks to assert. As such, she lacks that "personal stake in the outcome of the controversy [so] as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). *Accord*, *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); and *Rakas v. Illinois*, 439 U.S. 128, 132 (1978) n. 2.

Appellant in neither her Jurisdictional Statement nor her brief has demonstrated why she should be allowed to press the interests of her late, alleged father and live mother, therefore, this appeal should be dismissed as improvidently granted.

*Warth* is especially pertinent in the present case because the assertion of third party rights and the rights

of others not a party to this action are inextricably interwoven throughout the fabric of Appellant's brief.<sup>51</sup>

For the same reasons, Appellant's attack on the "date-of-filing" test as "over inclusive" (Brief of Appellant at pp.25-27) must be dismissed for lack of standing. Appellant not having alleged how "over-inclusiveness" has impacted upon her, nor having alleged that she is in the class so affected, it is clear that this attack must be dismissed. As an additional and independent ground for dismissal of this argument is that whatever the validity, *vel non*, of Appellant's conclusion that "The 'time of filing' test actually jeopardizes orderly probate procedure and settlement of titles" (*Id.* at 26) this is purely a local administrative concern, best handled by the Texas courts.

**B. ADJUDICATION ON THE MERITS WOULD REQUIRE THIS COURT TO OVERTURN FINDINGS OF FACT BY THE STATE COURT, WHICH FINDINGS ARE AMPLY SUPPORTED BY THE RECORD.**

It must be stressed that the entire argument of Appellant before this Court flows from the posited assertion that the evidence of Prince Ricker's paternity of Delynda Ann Ricker Barker Reed was "clear and convincing."<sup>52</sup>

51. *E.g.*, Brief of Appellant, at p.69: "The importance of the state's objectives in probate—prevention of spurious claims and providing for orderly devolution of property is not in dispute. The § 42 discrimination against women, however, is not substantially related to achieving these objectives"; at p.71: "In *Trimble v. Gordon*, *supra*, proof problems were held to be insufficient justification for discrimination based on illegitimacy. The same problems cannot justify discrimination against certain classes of women—in this case, surviving mothers of illegitimates"; at p.14: "The lower court did not address Delynda's claim that the Texas probate statutes discriminate against mothers who face the intestate death of the fathers of their illegitimate children."

52. Appellant's Jurisdictional Statement, p. 6, n.1. This erroneous characterization is reasserted in various places within Appellant's Brief: *e.g.*, p.7, n.1, paternity "conclusively established"; p.70, "paternity has been favorably adjudicated"; p.75 "cogent proof", p.86, "clear and convincing"; p.93, "convincing"; p.96, "convincing"; p.97 "clear and convincing."



This assertion is apparently predicated primarily upon the opinion of Prince Ricker's sister that the Appellant is a "perfect cross between her mother and Prince." Appellant's Jurisdictional Statement at p.6, n.1. (Hereinafter "Jurisdictional Statement"). Appellant attempts to buttress this purportedly "clear and convincing" evidence by recourse to "comparison of pictures." (*Id.*) These photographs, taken at times unknown, and of unknown clarity and quality, unsupplied in the record, constitute the second prong of Appellant's assertion that paternity was established by "clear and convincing" evidence.

This conclusion is in contradiction of the findings of fact by the Texas courts. The state Court of Appeals in affirming the take-nothing judgment rendered against Appellant in the state District Court, specifically held,

Prince Ricker was a chronic alcoholic with associated mental problems and was judicially declared non compos mentis in July, 1968. \* \* \* The plaintiff [argues she was] entitled to inherit from [Prince Ricker] since the evidence conclusively established as a matter of law that the father recognized her as his child. To the extent that this point presents the argument that the evidence conclusively established that the father recognized the Plaintiff as his child, it will be overruled since the evidence was hotly contested on this issue. The instances of recognition by the father of the child are opposed in the main by the strong evidence of the deteriorated mental condition of the father during each occurrence as well as positive occurrences of nonrecognition. *Id.* at 698-699.

It is suggested that for Appellant to succeed, it will be necessary for this Court to overturn the clear and unambiguous finding on the crucial point of paternity by the Texas courts. *Reed v. Campbell, supra.*

Appellant's present recitation of "clear and convincing evidence" (Jurisdictional Statement, p.6, n.1) has been specifically reviewed and rejected by the Texas courts.

For example, Appellant claims that "when he married Delynda's mother [Annabel Boutwell] Prince Ricker agreed that they would be husband and wife." *Id.* The state court specifically found,

Annabel Boutwell testifies she and Ricker were ceremoniously married in Juarez, but she did not know any of the witnesses present and claims she lost the marriage certificate evidencing the alleged marriage. . . . [T]wo certificates of non-existence of records from Mexico [] showed that the civil registries showed no marriage of Prince Ricker and Annabel Boutwell from January, 1957 to December, 1959, in the Mexican registries. 682 S.W.2d 697, 700. The jury failed to find that Boutwell and Ricker did hold themselves out to the public as husband and wife until June, 1958. *Id.* at 699.

Appellant further claims that "After Prince Ricker's ceremonial marriage he moved his personal things [but not himself] into the house which Delynda's mother shared with her mother in Big Spring." *Id.*

The state court specifically found:

[A] teaching associate of Ricker's testified that a search of school records did not reflect whether Ricker was or was not married. He testified that he was under the impression that Ricker was single because he never mentioned a family. *Id.* at 701.

Appellant further claims that "The couple were listed together at that address [Big Springs] in the city directory." *Id.* The state court found:

Annabel Boutwell testified that from the time of the purported marriage until she and Prince Ricker ended their relationship in 1958, she continued to live with her mother in Big Springs and Ricker kept his residence in Stanton, Texas[.] *Id.* at 700-701.

Appellant claims further that "Delynda's mother testified at the trial that she had sexual relations only with Prince Ricker from their wedding until after Delynda was born." *Id.* The state court found:

Annabel Boutwell never filed suit for child support nor did she ever attempt to establish the paternity of Prince Ricker during his lifetime. *Id.* at 701.

Appellant claims, "Prince Ricker sometimes admitted only that he *could* have been Delynda's father. At other times throughout his life he confided that he was the father." *Id.* (emphasis added). The state court found,

The instances of recognition by the father of the child are opposed in the main by the strong evidence of the deteriorated mental condition of the father during each occurrence as well as positive occurrences of non-recognition. *Id.* at 699.

[See also *Davis v. Jones*, 626 S.W.2d 303, 304 (Tex. 1982).]

Appellant maintains that, "[A]n alcoholic, [Prince] wrote in his A.A. work, that he was the father, *reasonably sure*, of a child born out of wedlock." *Id.* (emphasis added).

Appellant claims, "He [Prince] explained to his sister that this ["A.A. work"] meant Delynda." *Id.* [See *Davis v. Jones*, *supra*, rejecting as insufficient an oral social introduction by the father of a child as "my daughter" to a third person.]

Appellant claims that "the evidentiary basis of the finding of paternity was not attacked by Appellees in any of the state courts." *Id.* However, as is evident, the "evidentiary basis of paternity" was vigorously advanced to the Texas courts by Appellant on appeal, and was soundly rejected by the state court. With the determinative holding of the court in *Reed v. Campbell* decisively rejecting the claim of paternity, exactly where and in what circumstances would Appellant have Appellee "attack" this "clear and convincing" evidence of paternity?

Findings of fact by a state court are entitled to presumptive validity, especially when amply supported by the record, as is the case here. See *Townsend v. Sain*, 372 U.S. 293, 313, 318 (1962). Accord, *Wainwright v. Witt*,<sup>53</sup> 469

53. Both *Townsend* and *Wainwright v. Witt* were concerned with habeas actions by state prisoners. As such, their presump-

(Continued on following page)

U.S. —, 105 S.Ct. 844, 83 L.Ed.2d 841, 854 (1985), "[This Court has] emphasized that state-court findings of fact are to be accorded the presumption of correctness."); *United Gas Co. v. Texas*, 303 U.S. 123, 143 (1937) "This Court will review the findings of fact by a state court . . . where a federal right has been denied as the result of a finding shown by the record to be *without evidence to support it* [.] (emphasis added).

It is submitted that since the findings discussed herein are dispositive, are presumptively valid, and are not questioned by Appellant, this Court cannot *sua sponte* come to different factual conclusions. The standard of review here is not *de novo*. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) strongly counsels against granting the unique relief Appellant seeks from this Court. *Kremer* is of primary interest in its treatment of 28 U.S.C. § 1738.

Noting that, "As one of its first acts, Congress directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts."<sup>54</sup> *Kremer* continued,

Accordingly, the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Montana v. United States*, 440 U.S. 147 (1979); *Angel v. Bullington*, 330 U.S. 183 (1947). Indeed, from *Cromwell v. County of Sac*, 94 U.S. 351 (1877) to *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in ful-

(Continued from previous page)

tion of validity of state court findings of fact is especially telling in the case *sub judice*. For whatever the rather imprecisely drawn parameters of the intermediate level of scrutiny with which this Court reviews the claims of illegitimates may be (*Trimble*, *supra* at 767) it is submitted that this scrutiny does not even approach that of habeas action.

54. Act of May 26, 1790, Ch. 11, 1 Stat. 122, 28 U.S.C. § 1738 cited in *Kremer v. Chemical Construction Corp.*, *supra*, at 463.

filling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Comity will be well served by this Court's dismissal of this appeal or affirmance of the state court's traditional duty as reviewer of matters of state interest. For this court to adopt Appellant's position and retroactively apply *Trimble* through *Chevron* (See point IV *infra*) Appellant will still not inherit. Since the no-paternity issue with reference to inheritance has been resolved, Appellant cannot relitigate it between herself and the estate.

**C. ADJUDICATION ON THE MERITS WOULD REQUIRE THIS COURT TO FORMULATE ITS OWN CONSTRUCTION OF STATE LAW, THUS DOING VIOLENCE TO THE CONCEPT OF FEDERAL-STATE COMITY.**

To grant the relief requested, this Court's formulation of state law would be at variance with that of the Texas courts.

If this Court were to ignore the conclusion of the Texas appellate court in *Reed v. Campbell*, *supra* at 698-699, and find that the Texas court incorrectly analyzed the facts before it, then it is submitted that there is only one other thing those findings could be, and that is a construction of state law.

If it be assumed that the critical determination of lack of paternity on Prince Ricker's part is not a finding of fact, but a construction of state law, then the end result is the same. Assuming, *arguendo*, that the passage is a conclusion that is reached by an application of state law, then the compelling conclusion must be that based upon historic state-federal respect, the construction in question has been entrusted to the state courts.

The applicable evidentiary standard as applied by *Reed* is to be found in *Davis v. Jones*, *supra*. It is im-

portant to note that Appellant makes no attack of any kind on the evidentiary formulation of the Texas courts.

As the Supreme Court of Texas in *Davis* observed in its canvassing of this Court's applicable decisions:

[I]t must be noted that in each<sup>55</sup> of the cases by the Supreme Court there was strong evidence of paternity; a court decree that the "father" support the child, the signing of a birth certificate and the furnishing of support, the formal consent of "my son" to marry, the formal acknowledgment of the child for purposes of support, and the like. As to [the parties in *Davis*] there are only some oral statements to a third party and letters . . . in which Warren Davis Sr. recognized Kathryn and Craig as his daughter and his grandson respectively. *Id.* at 309.

However, even if this court were to decide the present case, it is argued that the evidentiary findings and construction of state law in *Reed v. Campbell* cannot be disturbed. Unless this court is prepared to rewrite Texas law on the subject of rules of evidence, the evidentiary standard gleaned from *Davis* is clear, Appellant is unable to prove her case.

The Texas appellate court has already decisively rejected the finding of paternity. The Texas Supreme Court has rejected as insufficient for evidentiary purposes and oral statements indicating paternity to a third party and written letters acknowledging paternity,<sup>56</sup> as well as a photograph showing the putative father and his alleged daughter in the same print.<sup>57</sup>

Furthermore, the Texas statutes of which Appellant complains were overhauled in light of *Trimble* and are in

55. *Trimble v. Gordon*, *supra* (1977), *Labine v. Vincent*, *supra* (1971) and *Lalli v. Lalli*, *supra* (1978).

56. Which presumably could be authenticated by a handwriting expert, as opposed to "comparison" of photographs on which Appellant relies. See Appellant's Jurisdictional Statement, p.6, n.1. A photograph showing the claimed father and illegitimate daughter in the same shot was found unavailing in *Davis*, 626 S.W.2d 303, 304. The holographs at issue in *Davis* were without signature. *Id.*

57. *Supra* note 8.



full compliance with that decision. The evidentiary standard of Texas used to establish paternity—not under attack here—is reasonable under *Lalli*. And that standard precludes the relief Appellant seeks.

It cannot be doubted that a construction of state law not in violation of federal constitutional provisions is without the jurisdiction of this Court. *United Gas Co. v. Texas*, *supra* at 139:

It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedures actually adopted satisfied all state requirements.

*Accord*, *Hall v. DeCuir*, 95 U.S. 485, 487 (1877). See also *John v. Paulin*, 231 U.S. 583, 585 (1913); *Lee v. Central of Georgia Ry Co.*, 252 U.S. 109, 110 (1920); *Central Union Co. v. Edwardsville*, 269 U.S. 190, 194-195 (1925); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 362, 363 (1932) (Cardozo, J.); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 104 (1944); *Dixon v. Duffy*, 344 U.S. 143, 144 (1952).

Appellant having made no complaint as to the manner in which the Texas courts reached the critical evidentiary findings, it is clear that for this Court to adjudicate on the merits, it will be necessary to *sua sponte* overturn those findings.

Further, for this Court to actually grant the relief sought,<sup>58</sup> it will have to re-weigh the evidence and construct

58. Appellant asks this Court, *inter alia*, to remand directly to the Texas trial court, by-passing the state court of appeals from whence this judgment comes. In so doing, Appellant asks this Court to enter a Mandate ordering the trial court to "Declar[e] that Delynda is the legitimate child of her natural father, Prince Rupert Ricker, pursuant to Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§ 37.005 and 37.003." (Appellant's Brief on the Merits, pp.99-100). See also Appellant's request that this Court order the trial court to award attorney's fees as provided for under Texas law "and by the Fourteenth Amendment as the equivalent of the fees provided by Family Code § 13.42(b)." (*Id.* at 100-101). It is submitted that Appellant misperceives the role and function of this Court as the ultimate arbiter of the United States Constitution.

its own evidentiary standard. If the Court were to take this action, it would be, in essence creating an independent federal common law regarding evidence, impermissible under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).<sup>59</sup>

## II

### THE PRESENT APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

Due to the independent evidentiary conclusion of the Texas appellate court, an adequate independent state ground exists to support the judgment. See *Wainwright v. Sykes*, 433 U.S. 72, 81 (1976). *Accord*, *Dixon v. Duffy*, *supra* at 146. "If the state judgment was based on an adequate state ground, the court, of course, would be without jurisdiction to pass upon the federal question." *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. Memphis*, 20 Wall. 590 (1875); *Avery v. Milland County*, 390 U.S. 474, 486 (1967) (Harlan, J., dissenting); *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1964); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1944); *Harris v. Zion Savings Bank and Trust Co.*, 313 U.S. 541 (1940).

This conclusion is especially compelling here in view of the extraordinary limited impact the Court's adjudication of this case would have. It is important to note that the situation at bar is incapable of repetition.

Appellant would argue that great numbers of illegitimate children are impacted upon by the probate practices she attacks.<sup>60</sup> However, as becomes clear from an examination of Appellant's Brief, this simply is not the case.

59. See also *Larson v. Valente*, 456 U.S. 228, 267, n.4 (1981): "[This Court should not] venture[] into a realm of state evidentiary law in which it has no competence and no business." (Rehnquist, J., dissenting).

60. E.g., Brief of Appellant, at p.42: "After *Labine* it was less clear than before that illegitimate children and women would continue to be regarded as 'persons' within the meaning of the Fourteenth Amendment, at least in matters touching on family, property, and probate rights."; at p.63. "The purpose of *Trimble* is to allow nonmarital children an equal opportunity to share in

(Continued on following page)



The present case involves a class of one. The Appellant. Under Appellant's own formulation, relief would be afforded only to those illegitimates impacted upon by the date of filing test, post-*Trimble*. The 1977 and 1979 amendments to § 42 of the Texas Probate Code have completely eradicated the situation of which Appellant complains. Therefore, the *only* illegitimates who could possibly be affected are those who have not fallen under the 21-year extension of Texas Family Code § 13.01, whose fathers died *before Trimble*, but whose inheritance was denied based on the date-of-filing test, and where the estate is *still open to this day*.

Appellant in point of fact, did not fall within the time constraints for legitimation prescribed by the Texas Legislature. That she should be so impacted is no reason to burden this Court with the task of what is, in substance, the minute adjustment and administration of the timing of certain Texas probate statutes. *See* Appellant's Request for Relief at pp.99-101.

That the tolling of the statute of limitations is the actual source of Appellant's complaint is obvious from her Jurisdictional Statement. At the trial level in the Texas courts,

Appellees filed a motion for summary judgment that Delynda should not inherit because she had not been legitimated by a valid marriage of her parents or under the statutory procedures of the Family Code. *They pointed out that Delynda's claim for legitimation under the family code was barred by limitations.* Delynda responded that issues were raised as to whether

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their father's estate; this can hardly be outweighed by Appellee's desire to profit from the inequitable treatment which has historically been visited on illegitimates." at p.64. "The exclusion of nonmarital children from the rights granted children generally falls more heavily on them than the recognition of their rights would fall on others." at p.73. "The rights and benefits conferred on some illegitimates by Chapter 13 [Texas Family Code] are wholly denied to Delynda's class of illegitimates, who were born prior to its effective dates."

she was her father's child, whether she was illegitimate *and whether suit to establish paternity had been filed in time.* \* \* \* Appellees moved for judgment on two grounds (1) that *Trimble v. Gordon* had not been applied retroactively where the death was before *Trimble* was handed down and the claim for heirship was filed afterward; and (2) that Delynda could not inherit without being legitimated, and that *limitations barred her legitimation.* The trial court overruled Delynda's motion, and entered judgment for Appellees without opinion. (Jurisdictional Statement, pp. 10-11, emphasis added).

This case necessitates no ambitious analysis as to whether *Trimble* should be applied retroactively; all that is needed is a determination of whether the Texas limitations statute is reasonable under *Lalli* and *Mills, infra*.

The only question at issue in this case is the reasonableness of the Texas limitations statute.

The mischiefs that this Court proscribed in *Trimble* were taken full heed of, and corrected by the Texas legislature,

The Texas Legislature was in session in 1977 when the Supreme Court handed down *Trimble*[.] The Legislature, in 1977, amended § 42 of our Probate Code to provide for alternative methods of making children legitimate. \* \* \* The 1977 Texas statute was enacted after *Trimble* and, presumably, in the light of its teachings. *Davis v. Jones*, 626 S.W.2d 303, 305, 308 (Tex. 1982).

In response to *Trimble*, Texas liberalized its Probate Code. Under the pre-*Trimble* version, an illegitimate could inherit from the father only by subsequent marriage of the parents, even if that marriage was null in the law.<sup>61</sup> The post-*Trimble* 1977 version permits paternal inheritance on the part of an illegitimate not only by marriage of the parents, but also through voluntary legitimation

61. Tex. Prob. Code § 42 (1955 version). See arguments III & IV *infra*.

proceedings under Chapter 13 of the Texas Family Code.<sup>62</sup> The 1979 version of the Code provides for identical inheritance rights, maternal and paternal, to be applied to illegitimates.<sup>63</sup>

Texas already treats illegitimate inheritees, whether from the father or the mother, exactly alike by statute. Texas has, on its own initiative, after the *Trimble* holding, altered its pre-1977 practices. Any decision by this Court to retroactively apply *Trimble* will have no impact on the laws and practices of Texas in this area, since the state already provides what *Trimble* commands.

It is well settled that this Court will not entertain a case that lacks a substantial federal question. *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938). *Accord*, *Fenwick v. Meyers*, 275 U.S. 485 (1927) (per curiam); *Stimson v. City of Los Angeles*, 264 U.S. 569 (1923) (per curiam), and will dismiss an appeal filed from a state court as improvidently granted if examination reveals no substantial federal question. *Gaines v. Washington*, 277 U.S. 81 (1928); *Miller v. California*, 418 U.S.

62. Tex. Prob. Code § 42 (as amended in 1977). Illegitimate children could inherit from the father, but not the father's relatives, and vice versa. The Legislative History of the revision reveals: Background Information: The intent of the Family Code revisions dealing with legitimation of the children was to equalize the status of legitimated children and legitimate children. Because of oversight, however, inheritance rights under the Probate Code were not amended to equalize the rights of the two groups of children. Since illegitimate children who have been legitimated have the same status as legitimate children for other purposes, it is inequitable to deny the legitimated child equal inheritance rights (as cited in *Davis, supra*, 626 S.W.2d 303, 305, n.2).

63. Tex. Prob. Code § 42(a), (b) (As amended in 1979). The inequity recognized in n.23 and in the text was fully corrected, illegitimate children in Texas now having identical inheritance rights. For an illegitimate child to become the inheritable child of the father, the parents must intermarry, the father must acknowledge the child as provided for in Ch. 13 of the Texas Family Code, or the relationship can be established by court decree. Significantly for purposes of acknowledgement, Texas recognizes and will accept not only its own method, but "a like statement in another jurisdiction." *Davis, Id.* at n.5.

915 (1974) ("Miller II"); *Kraft, Inc. v. Florida Department of Citrus*, 456 U.S. 1002 (1982).

The test of whether a case lacks a substantial federal question was stated in *California Water Service Co. v. City of Redding, supra* at 255. "The lack of substantiality in a federal question may appear either because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." (cite omitted)

The test was further amplified in *Hagans v. Levine*, 415 U.S. 528, 536-537 (1973):

Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and insubstantial as to be absolutely devoid of merit," . . . "wholly insubstantial," . . . "plainly unsubstantial" . . . or "no longer open to discussion." (cites omitted)

Thus, the instant appeal should be dismissed under either prong of the insubstantiality test. Considering the test *in seriatim*, the following conclusions become clear.

Appellant's claim is wholly without merit in the instant action, because Appellant has not demonstrated in the slightest the impropriety of the holding of no-paternity in *Reed v. Campbell, supra*. Though Appellant attacks *Reed* for its "time of filing" test, no complaint is heard over the no-paternity conclusion.<sup>64</sup>

64. The closest thing to an "attack" that Appellant makes on *Reed's* no-paternity conclusion is to be found at pp. 97-98 of Appellant's Brief on the Merits where she conclusively asserts, "Delynda proved her relationship to her father by clear and convincing evidence[.]" Appellant makes no due process claim as to the standards utilized or methods in *Reed* to reach the no-paternity holding. Not having done so, she has instead based her entire brief to this Court on her own perception as to the weight of the evidence. The most that can fairly be said is that Appellant does not agree with the evidentiary conclusion of the Texas courts. Mere displeasure with the evidentiary conclusion of a state court, absent any claim that the state court reached that conclusion in a way that deprived Appellant of due process, is an insufficient basis for appeal to this Court.

If this Court were to do exactly what Appellant wants, namely retroactively apply *Trimble* through *Chevron*, the result of this Court's holding would still not permit inheritance. This is so because the determinative holding of no-paternity from *Reed* would preclude Appellant from inheriting from an estate in which it has been judicially determined that there is no familial relationship between Appellant and decedent.

The instant appeal is equally infirm under the second prong of the insubstantiality test. This is clear in consideration of two factors. One being the method by which Texas provides for acknowledgement of illegitimate, the second being the 21-year extension of the statute of limitations governing such legitimation.

As to the method for legitimation, this Court noted in *Gomez v. Perez*, *supra* at 538,

We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.

The "barrier" that Texas has erected is in no way "impenetrable" and is clearly reasonable under prior decisions of this Court. Texas provides a number of mechanisms whereby an illegitimate child, such as Appellant would be rendered inheritable. It must be stressed that these mechanisms are all alternatives, they are *not* cumulative. That is, satisfaction of any one of the criteria renders the illegitimate child inheritable—it is not necessary to satisfy all categories on the list.

*First.* An illegitimate child, such as Appellant, could have been rendered inheritable by a subsequent marriage of the parents, even if that marriage was a nullity in the law.<sup>65</sup> In Appellant's case, the state court specifically

65. Tex. Prob. Code § 42 (1977). It will be demonstrated how Appellant would have been eligible for all of these remedies under the 21-year extension of the limitations statute. It will be further demonstrated that the bad luck of Appellant in not falling

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found no marriage. Nonetheless, Appellant still avers to this Court that "clear and convincing" evidence of Prince Ricker's paternity can be seen from "the invalid marriage of her parents." Brief of Appellant at p.98.

The fact that *no* marriage was found in what precludes Appellant from inheriting.

There is nothing in the jurisprudence of this Court to even hint that a subsequent invalid marriage of the parents is in any way an improper vehicle to provide for inheritability of the children. This is especially so in light of the fact that a subsequent marriage is not the sole means to do so, and Texas provides a method of recognition of a child as legitimate although the marriage is a legal nullity. Tex. Fam. Code Ann. § 12.02(b). This recognition sets the Texas practice apart from the Louisiana method proscribed in *Weber v. Aetna Casualty & Surety Co.*, *supra*. In *Weber*, this Court found critical that it was a legal impossibility for the father to acknowledge the illegitimate children. *Id.* at 171.

The fact that intermarriage of the parents is *not* a necessity to render the child inheritable renders the Texas practice fully in accord with *Lalli v. Lalli*, *supra* at 266-267. The marital status of the parents is wholly irrelevant, since Texas will even recognize the issue of a marriage null in the law.

*Second.* Illegitimate children in Texas can be rendered inheritable by Voluntary Legitimation under Ch. 13, Texas Family Code. In *Parham v. Hughes*, *supra* this Court sanctioned Georgia's legitimation procedure. The Georgia procedure was significantly less generous than the Texas practice at issue here, since Georgia, unlike Texas, made no provision for acceptance of out-of-state paternity acknowledgment events.

In *Lalli*, this Court sanctioned the New York practice, which mandated that paternity could be established

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within the ameliorative extension is no ground to attack the limitations statute as irrational or not closely attuned to promote a legitimate state interest.



by judicial decree only during the lifetime of the alleged father. *Lalli v. Lalli*, *supra* at 263.

*Third.* Texas provides that the issue of inheritable paternity can be established by court decree, in full compliance with the holdings of *Lalli* and *Parham*.

It cannot be emphasized enough that satisfaction of *any* of the above renders an illegitimate inheritable under Texas law. Each of the alternative methods under Texas law to render an illegitimate child susceptible of inheriting is clearly and unquestionably constitutional under decisions of this Court.

Thus, Appellant is only left with the option of attacking the 21-year extension of the limitations statute Texas enacted to enable illegitimates to avail themselves of the above options.<sup>66</sup> Because Appellant unluckily did not fall within the time span of the generous ameliorative statute, she attacks it.

In clear recognition of this Court's holdings in *Mills v. Habluetzel*, 456 U.S. 91 (1981) and *Pickett v. Brown*, 462 U.S. 1 (1983), Texas extended the limitations statute during which period illegitimates can avail themselves of the mechanisms to render themselves susceptible of inheritance.

As is evident, this Court's holdings and separate opinions in *Mills*, *infra*, and *Pickett*, *infra*, the Texas Legislature drafted the limitations extension with these cases in mind.

In *Mills*, this Court struck down as unconstitutional Texas' one year statute of limitations in which paternity

66. Tex. Fam. Code § 13.01 (1983) "Time Limitation of Suit. A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought on or before the second anniversary of the day the child becomes an adult, or the suit is barred."

Section 13.02 (1983) provides: "A cause of action that was barred before the effective date of this Act but would not have been barred by § 13.01, Family Code, as amended by this Act, is not barred until the period of limitations provided by § 13.01, Family Code, as amended by this Act, has expired."

proceedings must be brought. *Mills v. Habluetzel*, *supra* at 101. Finding the one-year limitations period to be so truncated that it did not provide a meaningful period in which to establish paternity, this Court noted, "[T]he period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf." *Id.* at 99.

Justice O'Connor, concurring separately, wrote "separately because I fear that the opinion may be misinterpreted as approving the 4-year statute of limitation" (*Id.*) that Texas then used to govern paternity actions.

Justice O'Connor, expressing a view held by a majority of this Court stressed,

It is also significant to the result today that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff. Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment. When this observation is coupled with the Texas Legislature's efforts to deny illegitimate children any significant opportunity to prove paternity and thus obtain child support, it is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests.

*Id.* at 104-105 (footnote omitted)

In *Pickett v. Brown*, *supra*, this Court relied heavily on *Mills* to conclude that Tennessee's two year limitations period for paternity actions was unconstitutional. In so doing, the court in *Pickett* noted Justice O'Connor's *Mills* observation that "a paternity suit was one of the few Texas causes of action not tolled during the minority of the plaintiff."

Thus, in redrafting its paternity action limitations statute after *Mills*, the Texas Legislature faced this situation: *First*, the one year limitations period was held unconstitutional in *Mills*. *Second*, a two year limitations period was held unconstitutional in *Pickett*. *Third*, a ma-

majority of the Court in *Mills* through Justice O'Connor's concurrence, had expressed the view that a four year statute of limitations would likely to be found unconstitutional. *Fourth*, a majority of the court in *Mills*, through the concurrence of Justice O'Connor, observed that it was a "fair question" whether a paternity limitations statute that expired during the minority of the plaintiff "Advance[d] permissible state interests." *Fifth*, this concern was treated with approval by the unanimous court in *Pickett*.

Texas redrafted its paternity limitations statute so that it terminated only after the illegitimate child reached the age of majority. The state provided that the limitations statute would not expire until "the second anniversary of the day the child becomes an adult." Tex. Fam. Code § 13.01 (1983).

Texas paid close heed to the decisions of this Court, and drafted a statute of limitations that is constitutional under *Mills* and *Pickett*. This being the case, Appellant has been relegated to the position of attacking the 21 year extension of the limitations statute because it does not "bear a substantial relation to the state interest of avoiding stale or fraudulent claims."<sup>67</sup>

Because the State has placed itself in full compliance with *Mills* and *Pickett*, Appellant attacks the statute. The state is placed between *Soylla* and *Charybdis* due to its good faith efforts to obey the holdings of this Court.

However, as is obvious, since Appellant did not fall within the 21-year extension, the only way to placate Appellant would be if the Texas Legislature enacted a statute of limitations *longer* than 21 years, with Appellant specifically in mind, and terminating on a date one day beyond Appellant's birthday.<sup>68</sup>

67. Brief of Appellant at p. 74. See *Mills v. Habluetzel*, *supra* at 99-100: "[A]ny time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."

68. Or, the Legislature might enact a special bill to make Appellant alone eligible. The equal protection problems with this approach are too obvious to require elaboration.

Exactly where would Appellant have the Texas Legislature draw the line? The act of drawing a line itself cannot be deemed unreasonable under the Fourteenth Amendment. When the question is debated as to where the cut-off point is to be established, Appellant has led us into the realm of open debate. And the Texas Legislature has acted reasonably in drawing the line where it did.

"The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." *Avery v. Midland County*, *supra* at 484. See also *Lalli v. Lalli*, *supra* at 272-273. Accord, *New York Transit Authority v. Beazer*, 440 U.S. 568, 587 (1978).

The issue being decisively settled by prior adjudications of this Court, it is respectfully submitted that there is no substantial federal question as to the limitations period governing this case. Every exercise in line drawing carries the risk that some will be excluded precisely because of where the line is drawn. This does not implicate equal protection if the cut-off point was fairly selected. All Appellant wants this Court to do is judicially extend the cut-off point beyond 21 years to cover her individual claim. Other than the fact that the Texas extension of its limitations statute did not cover her birthday, Appellant in no way has demonstrated that the point selected is not in full accord with *Mills* and *Pickett*. That being the case, this appeal should be dismissed for want of a substantial federal question.

### III

#### ADJUDICATION ON THE MERITS WOULD CONSTITUTE ISSUANCE OF AN ADVISORY OPINION WHICH IS FORBIDDEN UNDER ARTICLE III TO THE UNITED STATES CONSTITUTION.

Adjudication on the merits in the present case would be a nullity because the Appellant has not attacked the inheritable paternity conclusion of *Reed v. Campbell*, *supra*. It is clear the point has been waived. Since the standard of

review is not *de novo*, this Court cannot *sua sponte* overturn the *Reed* holding. This is especially so in the light of the fact that the no paternity conclusion is supported by the record.

In this specific framework, which governs this case, any analysis and conclusion as to whether *Trimble* should be retroactively applied would constitute a decision akin to an advisory opinion because Appellant could not possibly profit from the holding. The *Reed* holding of no inheritable paternity would foreclose inheritance on the part of Appellant, even if *Trimble* were held to govern her case. Ability to benefit from the holding of this Court is an indispensable necessity in establishing the Court's jurisdiction. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

Thus, the question of whether *Trimble* applies retroactively would be an exercise in an "abstract, intellectual problem." *Coleman v. Miller*, *supra* at 460 (Frankfurter, J.). The Court would be issuing an opinion of which Appellant could gain no benefit, since the "no paternity" holding of *Reed* would still preclude inheritance. "It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency." *Id.* at 462.<sup>69</sup>

Consideration of whether an advisory opinion would issue in this case starts with Mr. Justice Brandeis' seminal and oft cited *Ashwander* opinion. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1935) (Brandeis, J., concurring) Justice Brandeis provided a canvassing of seven salient factors under which constitutional adjudication by this Court would be improvident.<sup>70</sup> Appellant's re-

69. The Court is also asked to consider certain factors enumerated in the text, *supra*. Namely that this case, if decided on the merits, would apply solely to a class of one, and the fact that Texas has totally revamped the applicable portions of its Probate Code, and is already in full compliance with *Trimble*.

70. Appellee recognizes, of course, that the opinion was rendered in the trenchant, immutable propositions advanced by Justice Brandeis are equally applicable when this Court is called upon to decide actions of State legislation.

quest for retroactive application of *Trimble* would be barred by four of the seven factors, namely:

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it" . . . "It is not the habit of the Court to decide questions of a Constitutional nature unless absolutely necessary to a decision of the case."

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

4. The Court will not pass upon a constitutional question presented by the record, if there is also present some other ground upon which the case may be disposed.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. *Ashwander v. Tennessee Valley Authority*, *supra* at 346-348 (citations omitted).

Applying these factors *in seriatim*, the conclusion that the appeal was improvidently granted and constitutional adjudication is disfavored in this matter becomes evident.

An examination of factor two reveals that this Court would be deciding a question of constitutional import "in advance of the necessity of deciding it" if it is held that *Trimble* must be applied retroactively. This is shown by Texas' overhaul of its Probate Code, which now puts the Code in full compliance with *Trimble*. A holding that *Trimble* must apply retroactively to a state that already does what *Trimble* commands would be at most an affirmation or ratification of the act of the Texas Legislature. Retroactive application of *Trimble* in this case would have not the slightest impact on the Probate Code of Texas.<sup>71</sup>

71. "It therefore becomes necessary to inquire what is meant by judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. 'Judicial power' says Mr. Justice Miller in his work on the Constitution, 'is the power of a

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As to factor three, many of the same concerns apply. If the holding is properly no "broader than is required by the precise facts to which it is to be applied" then the sole beneficiary in the entire nation of the Court's work would be the Appellant. This is evident from Appellant's own admissions that the scope of this decision will be limited to those illegitimates whose alleged fathers died pre-*Trimble*, who have been impacted upon by a date of filing test, and where the estate is *still open* nearly a full decade after *Trimble*. Additionally it is a misnomer to characterize Appellant as the "beneficiary" of any *Trimble* holding, because the *Reed* "no inheritable paternity" conclusion would still prevent her from inheriting.

The impact of the Court's decision would be to hold invalid a section of the Texas Probate Code (§ 42, 1955 version) which the Texas Legislature has already abolished.

Under factor four, it is clear that a determination of whether *Trimble* should be retroactively applied through *Chevron* is unnecessary. This case can be decided completely by determining whether the Texas limitations statute is reasonable under *Mills, supra*. Thus, the case *sub judice* "has some other ground upon which the case may be disposed of" without dealing with the *Trimble* retroactivity opinion.

Additionally, this appeal should be dismissed because "the judgement can be sustained on an independent state

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court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller on the Constitution, 314" \* \* \* "Such judgment [advisory opinion] will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question." *Muskraat v. United States*, 219 U.S. 346, 356, 362 (1911) (striking down a Congressional attempt to give the Court jurisdiction beyond the Constitution to settle an Indian land dispute).

ground.'"<sup>72</sup> The ground being, as has been noted, a finding by the state court which is amply supported by the record, or a determination of evidentiary insufficiency reached through application of state law. See *Mills v. Rogers*, 457 U.S. 291, 305 (1981) and *United States v. Hastings*, 296 U.S. 188, 193 (1935).

Factor five relates to Appellant's lack of standing, which has been demonstrated, *supra*. Appellant's complaint is that she did not come within the operative time span of the ameliorative statute. This is no ground to complain of the statute's purpose or effect. This appeal was improvidently granted.

#### IV

**NEITHER THE UNITED STATES CONSTITUTION NOR TRIMBLE V. GORDON IMPACT UPON THE STATE LAW WITH RESPECT TO RETROACTIVITY. THE LAW IN EFFECT AS OF THE DATE OF DECEDENT'S DEATH MUST CONTROL THE DESCENT AND DISTRIBUTION OF THE ESTATE. TRIMBLE SHOULD NOT NOW BE EXPANDED SO AS TO BE APPLIED RETROACTIVELY.**

If this Court were to conclude that this appeal has been providently granted, that the Appellant has standing, that adjudication would not require overturning findings of fact by the state court, that a decision on the merits would necessitate no construction of state law by this Court, nor creation of a federal common law, nor issuance of an advisory opinion, then as to the merits, it is clear that Appellant cannot prevail.

In considering this case on the merits, several critical factors render Appellant's claim outside the boundaries of relevant previous decisions of this Court.

**FIRST.** This is the only case wherein the issue of paternity was directly and specifically reviewed by the

72. "[I]f a construction of the statute is fairly possible by which the question may be avoided [the constitutional issue will be by-passed]" *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569 (1947). See also *New York Transit Authority v. Beazer, supra* at 582, n.22 and cases cited therein.



state courts and the issue decisively resolved against the Appellant.

*SECOND.* This is the only case presented to this Court wherein the child was subsequently adopted. As Appellant herself concedes, "Adoption in Texas severs all legal relationship between parent and child[.]'"<sup>73</sup>

*THIRD.* This is the only case presented to this Court wherein the putative parent had been adjudicated non compos mentis.

*FOURTH.* This adjudication, coupled with the alleged father's undisputed chronic alcoholism, renders his ambivalent statements that "he *could* have been [appellant's]<sup>74</sup> father," and "he was the father, *reasonably sure*, of a child born out of wedlock" sufficient to allow the Texas court to conclude that it was suspect.

*FIFTH.* This is the only case presented to this Court that lacks a positive, unambiguous acknowledgement of paternity on the part of the putative parent.

73. Appellant's Jurisdictional Statement, p.9. Appellant's full admission is "Adoption in Texas severs all legal relationship between parent and child, except that the right of a *legitimate* child to inherit directly from its natural parent is not extinguished." *Id.*, (emphasis added). Appellant prosecutes this appeal as an *illegitimate* child. Appellant has made no attack on this provision of Texas law regarding adoption.

74. Or, "Delynda" as the Appellant insistently and incessantly refers to herself in the brief. Appellant's Jurisdictional Statement, p. 6, n.1. It is not without significance that the latter quotation does not specify or identify the child that Ricker was "reasonably sure" he sired. Further, it will be noted that these quotations, which Appellant claims demonstrate "clear and convincing" evidence of paternity, are Appellant's own descriptions of the evidence. Not surprisingly, Appellant has portrayed the evidence to draw out every possible favorable inference to her case. And yet, even though the statements are filtered through Appellant, the best she can claim is that Prince Ricker "could" be the father and was "reasonably sure" he was the father of some unidentified illegitimate child. To claim that evidence of this caliber is "clear and convincing" strains credulity. It is thus no surprise that the Texas courts came to the conclusion that the evidence of paternity was woefully insufficient.

*SIXTH.* This is the only case presented to this Court wherein evidence of familial contact between the putative father and illegitimate child is wholly lacking.

*SEVENTH.* This is the only case presented to this Court wherein the alleged father of the illegitimate child played no role in the upbringing, nurturing, guidance, or parenting of the child.

*EIGHTH.* This is the only case presented to this Court where the putative father and illegitimate child did not live together, in a family unit, in the same house, under the same roof, for a significant period of years, indeed at all.

*NINTH.* This is the only case presented to this Court where there is absolutely no evidence of the purported father ever contributing financially to the child during his lifetime.

Appellant candidly admits that there was no familial relationship between herself and the man she alleges was her father.

Delynda was adopted as a small child. Like many adopted children, she had no idea that she was illegitimate, nor had she any reason to know. \* \* \* [S]he was unaware that she was illegitimate. \* \* \* For Delynda to have been aware of her status of birth, and of her constitutional right of the equivalent of Chapter 13 benefits, she would had to have been a constitutional scholar and a private detective. Brief of Appellant at pp. 81-84.

Even though Appellant has already conceded there was no familial relationship or contact with her alleged father, *infra*, she acknowledges—as she must—that establishment of paternity is crucial to her cause of action. At least Appellant does so by implication, but then intermixes that admission into a novel assertion regarding the Fourteenth Amendment that apparently has never been advanced prior to this action, *viz*:

Delynda's convincing proof<sup>75</sup> of paternity in the present action should be viewed as satisfying the constitu-

75. Specifically held to be unavailing by the Texas courts.

tional prerequisites to a Fourteenth Amendment remedy which is the equal of the statutory benefits of the Family and Probate Codes. \* \* \* Regarding the Family Code, her Fourteenth Amendment remedies include full legitimation, heirship, and attorney's fees. Brief of Appellant at p. 19.

Appellee recognizes that it is fully within the power of this Court to proscribe inequity in treatment between legitimate and properly acknowledged illegitimate children. It is argued, however, that this Court has no power under the Fourteenth Amendment, or any other provision of the Federal Constitution, to order that Appellant be deemed "fully legitimate" under the Texas Family Code.

This Court could hold that Appellant must be afforded treatment equal to that of legitimates, but it cannot transform her into a legitimate.

#### TRIMBLE SHOULD NOT BE APPLIED RETROACTIVELY

Appellee will first deal with the central thesis of Appellant's plea, and then in sequence other contentions raised by the Appellant.

Appellant should not benefit from retroactive application of *Trimble* by operation of *Chevron Oil v. Huson*, 404 U.S. 97 (1971). It is critical to note that though *Chevron* is cited by Appellant for formulation of the "retroactivity test", the case specifically held that as a general rule, state statutes of limitation should govern. *Id.* at 100.<sup>76</sup> Application or creation of federal limitations statutes

amounts to an inappropriate creation of federal common law. Even when a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply state statute of limitations for analogous types of actions.

*Chevron Oil v. Huson*, *supra* at 104.

76. *Chevron* decided the issue in the context of personal injury actions arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. cited at 404 U.S. 97, 98.

Thus, *Chevron* counsels the need to refrain from creation of an impermissible common law and strictly adhere to the prevailing rule that state statutes of limitations or laches doctrine should govern.

Even under *Chevron's* retroactivity test, it is apparent that *Trimble* should not be applied retroactively.

In our cases dealing with the retroactivity question, we have generally considered three separate factors. First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [cite omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [cite omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed. [cite omitted] Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [cite omitted]. Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [cite omitted].

*Chevron Oil v. Huson*, *supra* at 106-107.

As to the First factor: *Trimble* is a sharp break with past precedent whose result was not clearly foreshadowed. *Trimble* has been interpreted as overruling *Labine v. Vincent*, *supra*. *Estate of Sharp*, 151 N.J. Super. 579, 377 A.2d 730, 732 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 148, 394 A.2d 381 (App. Div. 1978); *See also Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977) ("Pendleton II"); *Cf. Pendleton v. Pendleton*, 531 S.W.2d 507 (Ky. 1975) ("Pendleton I"), vacated and remanded for consideration in light of *Trimble*.



Appellees in this case specifically relied upon the non-retroactivity of *Trimble* in their positions advanced, and arguments made before the Texas courts. *Reed v. Campbell, supra*. Appellees have already been injured in this case by speculation that *Trimble* might apply retroactively. Appellant has been able to keep the estate tied up for years with her claim. She has been able to do so solely by her advocacy of *Trimble* retroactivity.

As to the Second Factor: Retroactive application of *Trimble*, in the context of this case, would be a nullity. The Texas Legislature through the 1977 and 1979 revamping of § 42 of the Probate Code has already cured the defect proscribed by *Trimble*. The evidentiary standard of the Texas courts precludes Appellant from establishing paternity due to the quality and quantum of evidence she proffered.

The injury of which Appellant complains is not likely to recur. All probate impacting upon the rights of illegitimates has for over seven years been regulated by the revised § 42 of the Probate Code which is in full alignment with *Trimble*. Seven years after the revision of the Texas Probate Code and nearly a full decade after *Trimble*, the chance of repetition is virtually nil.

Third Factor: This case involves protection of the estate from further claims such as Appellant's, that the state courts have already concluded have no basis in law or in fact. *Reed v. Campbell, supra*.

A further factor worth noting is that although Appellant relies upon *Chevron* for its retroactivity test, this Court, in the 15 times it has cited to *Chevron* since the case was decided sixteen years ago has *never* used the case to apply a decision retroactively.<sup>77</sup>

77. These cases are: *Lemon v. Kurtzman*, 411 U.S. 192 (1972) ("Lemon II") (retroactively rejected, *Chevron* mentioned only tangentially); *Gosa v. Mayden*, 413 U.S. 665 (1972) (retroactivity rejected, *Chevron* mentioned in one footnote in dissent); *Edelman v. Jordan*, 415 U.S. 651 (1973) (no retroactivity, case decided on other grounds, *Chevron* mentioned in one footnote);

(Continued on following page)

Retroactive application of the case was rejected in every one of the holdings in which *Chevron* appears, save one, and that was a criminal case. And in that case, *Chevron* was not used as the vehicle for retroactivity. See n.77, *supra*. Three of the cases in which *Chevron* appears had no retroactivity issue at all. Two cases were summary-one dismissed, the other vacated.

In the only two cases to come before this Court in which *Chevron* was advanced for the argument of retroactivity, the proposition failed. In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, *supra* at 87-88, this Court in a plurality opinion specifically rejected retroactive application of its holding via operation of *Chevron*. In *Heckler v. Edwards, supra*, the District Court had used *Chevron* to apply its own decision retroactively. That decision was reversed by this Court.

There is a good reason for Appellant's reliance on *Chevron* to argue retroactivity, and then her striking si-

(Continued from previous page)

*United States v. Peltier*, 422 U.S. 531 (1975) (retroactivity rejected, *Chevron* mentioned tangentially by majority, cited in one footnote by dissent); *Allison v. Fulton-DeKalb Hospital Authority*, 449 U.S. 939 (1980) (summary dismissal for lack of jurisdiction, *Chevron* mentioned in passing in one footnote in dissent); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1980) (no retroactivity issue, *Chevron* cited for proposition that state law limitations control); *Consolidated Foods Corp. v. Unger*, 456 U.S. 1002 (1982) (summary vacating and remand of judgment, *Chevron* mentioned once in concurrence); *United States v. Johnson*, 457 U.S. 537 (1982) (criminal case, limited to Fourth Amendment cases. *Chevron* irrelevant to decision); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (retroactivity through *Chevron* specifically rejected); *DelCostello v. Teamsters*, 462 U.S. 151 (1983) (limitations question, *Chevron* mentioned once in majority, cited in one footnote in dissent); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) (retroactivity rejected, *Chevron* mentioned briefly in concurrence); *Solem v. Stumes*, — U.S. —, 104 S.Ct. 1338 (1984) (criminal case, retroactivity rejected); *Heckler v. Matthews*, — U.S. —, 104 S.Ct. 1387 (1984) (retroactivity rejected); *Heckler v. Matthews*, — U.S. —, 104 S.Ct. 1387 (1984) (retroactivity rejected, *Chevron* cited once); *Heckler v. Edwards*, — U.S. —, — S.Ct. —, — L.Ed.2d —, 52 U.S.L.W. 4373 (1984) (District Court used *Chevron* to retroactively apply holding, overruled by this Court).

lence when it comes to other cases in support of the argument. There are none from this Court. This Court has never brought the concept as far as Appellant argues. Indeed, when faced with a like contention, this Court refuted it in *Northern Pipeline*.

*Chevron* is far from the clarion call for retroactivity that Appellant makes it out to be. The very holding within the *Chevron* opinion itself came down on the side of non-retroactivity: "[w]e conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case." *Chevron Oil v. Huson, supra* at 107.

It is not known from where Appellant comes to the conclusion that decisions of this Court have a determinative presumption of retroactivity in the civil field. It cannot be from any textual provision of the Constitution itself, for as Mr. Justice Cardozo noted for the unanimous Court in *Great Northern Railway Co. v. Sunburst Oil & Refining Co., supra* at 364, "[T]he federal constitution has no voice upon the subject." Nor can it be from the decisions of this Court, where the clear import of the holdings is that retroactivity is disfavored in the civil context. *Lemon v. Kurtzman*, 411 U.S. 192, 198-199 (1972).

Further counsel against retroactive application of *Trimble* through the never-utilized *Chevron* vehicle is *Gosa v. Mayden*, 413 U.S. 665 (1972) where retroactive reaction in the context of a criminal case (courts martial) was rejected.

A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of the state action, we thus seek only the assurance that the classification at issue bears some fair relationship to legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216 (1981).

This Court has consistently noted that differing standards of proof for establishing maternity and paternity of illegitimate children is acceptable due to the relative problems of proof. Matters of probate are the responsibility of the various states:

[T]he settlement and distribution of decedents' estates, and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; . . . the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with operations of state tribunals invested with that jurisdiction [.]

*Harris v. Zion's Bank*, 317 U.S. 447, 450 (1943)

*Accord Trimble v. Gordon, supra* at 771.

Inherent differences in establishing maternity and paternity justify a more demanding standard for paternity:

[A legitimate] state goal is to provide for the just and orderly disposition of property at death. We have long recognized that this is an area with which the States have an interest of considerable magnitude. \* \* \* This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Establishing maternity is seldom difficult. As one New York Surrogate's Court has observed: "[T]he birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is the child of a particular woman is rarely difficult to prove." [cite omitted]. Proof of paternity, by contrast frequently is difficult when the father is not part of a formal family unit. "The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy." [cite omitted] [emphasis in original]

*Lalli v. Lalli*, 439 U.S. 259, 268-269 (1978)



The Texas Legislature's abolition of the discriminatory sections of the Probate Code post-*Trimble* is a clear example of this Court's opinion in *Vance v. Bradley*, 440 U.S. 93, 97 (1978):

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. (footnote omitted)

#### TRIMBLE AND STATE RETROACTIVITY

The argument advanced in *Vance v. Bradley* calling for the democratic process to solve many of the problems coming before this Court reflects a respect for the concept of comity. At the very least where the courts or Constitution have not spoken states should be left to good faith procedural remedies.

Historically, there was a presumption that decisions should be given retroactive effect but the modern trend is that when a court does not specifically mandate that a decision is to be given retroactive effect the lower courts have the discretion to determine the extent to which they will apply a decision retroactively. (10 A.L.R.3d 1371, § 81(a) at 1398-1399).

State case law regarding this issue has used the "date of filing" analysis discussed previously. The state courts have generally held that when the intestate died prior to *Trimble* and the application to determine heirship was filed after *Trimble* then *Trimble* would not be applied retroactively. The only time the state courts have been willing to apply the *Trimble* decision retroactively is when the illegitimate had a case pending on April 26, 1977, the date of the *Trimble* decision.

In order to determine whether *Trimble* will be applied retroactively in this case it is necessary to review relevant Texas case law. *Winn v. Lackey*, 618 S.W.2d 910 (Tex. Civ. App. 1981), involved the inheritance rights of an illegitimate child. The father had died prior to *Trimble* and

the illegitimate child had not filed suit to determine heirship until after *Trimble*.

Relying on the rationale of *Frakes v. Hunt*, 583 S.W.2d 497 (Ark. 1979), *Winn* held that *Trimble* should not be applied retroactively in order to prevent chaotic title conditions. *Winn v. Lackey*, *supra* at 912. The putative father in *Winn* died in April, 1973, therefore § 42 of the Texas Probate Code as enacted in 1955 was applied and the child was denied paternal inheritance.

The court in *Lovejoy v. Lillie*, 569 S.W.2d 501 (Tex. Civ. App. 1978, ref'd, n.r.e.), addressed the issue whether § 42 of the Texas Probate Code as enacted in 1955 was constitutional in light of the *Trimble* decision. *Lovejoy* held that § 42 violated the Equal Protection Clause of the United States Constitution. *Id.* at 504. *Lovejoy* did not involve a retroactive application of *Trimble* because *Lovejoy* was pending at the time of the *Trimble* decision. *Winn v. Lackey*, *supra* at 912.

In the present case, the Texas Court of Appeals followed the rule in *Winn v. Lackey*, *supra*, *Reed v. Campbell*, *supra* at 700. The lower court followed the "time of filing" test and held that it would not apply *Trimble* retroactively when the application for heirship was made after *Trimble*. The court would only recognize retroactive application when the suit was on file at the time the *Trimble* decision was decided. *Id.* See also *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977); *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1978); *Compton v. White*, 587 S.W.2d 829 (Ark. 1979); and *Ford v. King*, 594 S.W.2d 227 (Ark. 1980).

Appellant cites to four cases arguing that they have applied *Trimble* retroactively and are similar to the present case. Appellant's Jurisdictional Statement, Appendix at C-6-13. Those cases do not apply *Trimble* to the extent Appellant is requesting this court to apply it.

For example, in *Gross v. Harris*, 664 F.2d 667 (8th Cir. 1981), the court expressly noted that had the case dealt

with inheritance rights, their decision may have been different. *Id.* at 671. With respect to *Pendleton*, it clearly comes within the exception provided for by the "date of filing" test. See also *Matter of Estate of Sharp*, 394 A.2d 381 (Sup. Ct. N.J. 1978). In *Marshall v. Marshall*, 670 S.W.2d 213 (Tenn. 1984), the court did not examine the retroactivity of *Trimble*, it addressed the issue of whether *Allen v. Harvey*, *supra*, should be applied retroactively.

There is a clear trend in current state case law adopting the "date of filing" test and those courts have applied the law in the state as of the date of death and have not applied the *Trimble* decision retroactively. Under the "date of filing" test, if the putative father died intestate prior to April 26, 1977 and the suit or application to determine heirship was filed after that date, then *Trimble* will not be applied retroactively. The only exception is for cases pending at the date of the *Trimble* decision. In that event, the courts will apply the *Trimble* rationale to the statute.

## V

### **AN ILLEGITIMATE CHILD WHO FAILS TO INHERIT UNDER THE THREE POSSIBLE METHODS OF LEGITIMATION STATUTORILY PROVIDED CAN CLAIM NO EQUAL PROTECTION VIOLATION WHEN THE LEGISLATION IN QUESTION IS SUBSTANTIALLY RELATED TO A LEGITIMATE STATE GOAL.**

At common law an illegitimate child had no rights of inheritance from either natural parent. The harsh result was that such a child was considered nullius filius, the child of nobody. The child was not only precluded from inheriting, he also could have no heirs except those of his body. *Allen v. Harvey*, *supra* at 831. The state legislatures slowly began to recognize the illegitimate child's rights to maternal inheritance and the laws have continued to evolve.

Section 42 of the Texas Probate Code was originally enacted in 1955; it provided illegitimate children with full

maternal inheritance rights and for paternal inheritance rights if the natural parents married. Section 42 was amended in 1977. As amended, the statute provided for a voluntary legitimation proceeding. In 1979, the legislature again amended § 42 to provide for involuntary, as well as voluntary, legitimation proceedings and for full paternal inheritance rights upon legitimation.

Section 42 was amended twice before this case was tried. Appellee argues that if this Court should reverse the lower court and apply *Trimble* retroactively, then § 42 in its present form should be applied.

Under § 42, in its present form, three alternative methods of legitimation are provided. The first is if the child is born or conceived before or during the marriage of his mother and father. The second is if the child is legitimated by a court decree, as provided by Chapter 13 of the Texas Family Code. The third method is if the father executed a statement of paternity as provided by § 13.22 of the Texas Family Code or a like statement properly executed in another jurisdiction. If the child is legitimated under one of these three procedures he is entitled to inherit from his father, as well as his paternal kindred.

Does § 42 in its present form impermissibly discriminate against illegitimate children? Two tests have evolved. The first is the "insurmountable barrier" test, initially used in *Gomez v. Perez*, *supra*. The second is the "substantial relationship" test, *Handley v. Schweicker*, 697 F.2d 999, 1002 (11th Cir. 1983).

In *Mills v. Habluetzel*, this Court utilized both tests to determine the constitutionality of a Texas statute that provided a one year statute of limitations for paternity proceedings. It was determined that one year failed to provide an adequate opportunity for a paternity suit to be brought in order to obtain support. *Id.* at 100. The statute failed both tests and was found to be a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 100-101.

After *Mills*, both tests must be applied to § 42 (1979) to determine whether it violates illegitimate children's rights to equal protection.

Section 42 (1979) does not present an insurmountable barrier to claims of inheritance by illegitimate children. Section 42 provides alternative methods of legitimation to all illegitimate children. It provides for both voluntary and involuntary means for a child to be legitimized. A putative father may execute a statement of paternity at any time during his life or he may marry the natural mother at any time after the birth of the child. The other alternative is a court decree to establish paternity under Chapter 13 of the Family Code.

Chapter 13 of the Texas Family Code provides for the procedures through which a court decree may be obtained. The effective date of Chapter 13 is September 1, 1975. The question became, what of illegitimate children born prior to the effective date of the statute?

In *Wynn v. Wynn*, 587 S.W.2d 790 (Tex. Civ. App. 1979, no writ), the court considered this question and held that children born prior to the effective date of Chapter 13 had a common law remedy to establish paternity.

Since the Appellant was entitled to all three procedures there was no insurmountable barrier presented by § 42.

Section 42 bears a substantial relation to permissible state interests and is carefully tuned to alternative considerations. The primary state goal underlying § 42 is to provide for prompt and orderly disposition of property upon death. This has long been recognized as a legitimate state interest. See e.g., *Lalli v. Lalli*, *supra*; *Trimble v. Gordon*, *supra* at 771; and *Labine v. Vincent*, *supra* at 538.

The other state goal, which underlies § 42, is to prevent fraudulent claims of inheritance. Based on the problems of proving paternity, it has been recognized that stricter standards for illegitimate children claiming under

estates are justified. *Trimble v. Gordon*, *supra* at 770. In fact, this Court has recognized the problems of proving paternity several times. *Mills v. Habluetzel*, *supra* at 97; *Lalli v. Lalli*, *supra* at 269; *Trimble v. Gordon*, *supra* at 772; and *Gomez v. Perez*, *supra* at 538.

In recent years methods of paternity testing have advanced greatly and with the use of HLA tests paternity can be predicted with a high degree of probability. Yet, this Court has recognized that the existence of these tests does not lessen the state's interest in preventing fraudulent claims. *Mills v. Habluetzel*, *supra* at 98.

Thus, it is clear that § 42 (1979) provides for full paternal inheritance rights, once the illegitimate child's paternity has been established or the child is legitimated, as well as full maternal inheritance rights. Section 42 (1979) is substantially related to a legitimate state interest and therefore does not do violence to the Equal Protection Clause of the Fourteenth Amendment.

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### CONCLUSION

For the reasons stated Appellee prays that this Court dismiss the appeal *en toto* as improvidently granted. In the alternative, assuming this Court entertains the merits of this claim, Appellee prays that the decision of the Court below be affirmed.

Respectfully submitted,

\*PAUL MCCOLLUM

*Counsel of Record*

KATHLEEN M. McCULLOCH

SHAFFER, DAVIS, MCCOLLUM

ASHLEY, O'LEARY & STOKER, INC.

Post Office Drawer 1552

Odessa, Texas 79760

(915) 332-0893

FLETCHER N. BALDWIN, JR.

Holland Law Center

University of Florida

Gainesville, Florida 32611

*Attorneys for Appellee*



NO. 85-755

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11-1-85  
APR 23 1985  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1985

\*\*\*\*\*

DELYNDA ANN RICKER BARKER REED, APPELLANT

V.

PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY,  
AND AS ADMINISTRATRIX OF THE ESTATE OF  
PRINCE RUPERT RICKER, DECEASED, APPELLEE

\*\*\*\*\*

ON APPEAL FROM THE COURT OF APPEALS FOR THE  
EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANT'S REPLY

R. Stephen McNally  
P.O. Box 1586  
Austin, Texas 78767-1586  
(512) 474-1397

COUNSEL OF RECORD FOR APPELLANT  
DELYNDA ANN RICKER BARKER REED

APPEAL DOCKETED OCTOBER 15, 1985  
PROBABLE JURISDICTION NOTED DECEMBER 9, 1985

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QUESTIONS PRESENTED

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RETROACTIVITY QUESTIONS:

1. Should Delynda be denied the benefit of the holding of this Court in Trimble v. Gordon under the "time of filing" test applied by the state court below?

2. Should Delynda benefit from the holding of this Court in Trimble v. Gordon under the test of Chevron v. Huson?

3. Should the retroactivity of Trimble be determined by whether the claim was filed in an open estate or as a collateral attack on a closed estate?

LEGITIMATION QUESTION:

4. Does the Fourteenth Amendment require an opportunity for Delynda to legitimate herself equivalent to the statutory procedures arbitrarily denied her?

SEXUAL CLASSIFICATION QUESTIONS:

5. Where maternal heirship requires only a preponderance of the evidence while paternal heirship is not allowed, is the distinction permissible?

6. Was the denial of Delynda's heirship from Prince Ricker justified in light of the jury's unchallenged finding of paternity and the convincing proof at trial?

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I.

THE TEXAS COURT OF APPEALS ACCEPTED THE JURY'S FINDING THAT DELYNDIA IS PRINCE RICKER'S CHILD.

A. THE JURY'S ANSWER TO SPECIAL ISSUE NUMBER ONE ESTABLISHED THAT DELYNDIA IS THE CHILD OF PRINCE RICKER.

As explained by the Court of Appeals,<sup>1</sup>

By their answers to the Special Issues submitted, the jury determined:

1. The Plaintiff was a child of Prince Ricker. . . .

([T]he trial) court received the jury's verdict and based thereon entered a take nothing judgment against the Plaintiff.

Paternity is thus the predicate which framed the issues considered by the Court of Appeals<sup>2</sup>:

Trial was to a jury which found that the Plaintiff was Prince's child but that her mother was never validly married to Prince. We will affirm the judgment of the trial court.

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1. Reed v. Campbell, 682 S.W.2d 697, 699 (Tex. App. -- El Paso 1984, ref. n.r.e.); Appendix A of the Jurisdictional Statement (J.S.) at p. A.4.

2. (Reed, p. 698; JS A.2).



B. THE ENTIRE REED OPINION DEMONSTRATES  
ACCEPTANCE OF THE JURY'S FINDING.

Throughout the Reed opinion, the Court of Appeals refers to Prince Ricker as "the father" of Delynda and "her father". (Reed, pp. 699-700; JS A.7-8).

The reasoning of the lower court demonstrates its acceptance of Prince's paternity. It held that she

would not inherit as a 'recognized' illegitimate child since Section 42(b) of the Probate Code provides the only methods by which an illegitimate child may inherit from her father. Being a 'recognized' illegitimate is not one of them. . . .  
Johnson v. Meriscal, [620 S.W.2d 905 (Tex. Civ. App. -- Corpus Christi 1981, writ ref'd, n.r.e.)] held to the contrary. . . .

Reed, p. 400; JS A.8. Appellees quote a portion of the discussion of the evidence of "recognition" under Johnson v. Meriscal out of context as showing a holding of "no paternity."

Reed also considered whether Delynda was legitimated by a common-law or putative marriage of Prince Ricker and her mother. If Prince Ricker were not Delynda's father, it would be irrelevant to her heirship whether he married her mother.<sup>1</sup> A portion of the opinion discussing whether Delynda's parents had married was quoted out of context by Appellees as a "no paternity" finding.

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1. Delynda also asked the lower court to deem her legitimate by construing the marriage found by the jury to fall within the Texas invalid marriage statutes, Family Code 12.02(b) and the last sentence of Probate Code §42. The lower court instead adopted Appellees' position that the meaning of "marriage" in these statutes was so narrow that the bigamous wedding of Prince Ricker and Delynda's mother was "merely meretricious, being no marriage at all" (Reed, p. 698; J.S. p.A.4). This strained construction, in which the Texas Supreme Court held to be "no reversible error", was necessary only because Prince Ricker is Delynda's father.

C. APPELLEES POSITION AT TRIAL, ON APPEAL, AND IN THE TEXAS SUPREME COURT CAUSED EACH TO RENDER JUDGMENT THAT DELYNDY WAS THE ILLEGITIMATE CHILD OF PRINCE RICKER, ESTOPPING APPELLEES TO CLAIM THAT IT WAS ERROR TO ACCEPT DELYNDY AS PRINCE'S NATURAL CHILD.

Appellees asserted at trial,<sup>1</sup> in the Texas Court of Appeals,<sup>2</sup> in the Texas Supreme Court,<sup>3</sup> and before this Court,<sup>4</sup> that the jury finding of paternity has established Prince Ricker as the father of Delynda, but that this is insufficient to allow Delynda to inherit. Because this

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1. J.A. p.68 (Appellees' Motion for Judgment on the Verdict); J.S. p.A.17 (jury verdict received without objection); J.A. p.77 (Appellees' Response to Motion for Judgement); S.F. V.9, p.3 (Appellees retract objection to paternity evidence as insufficient: "Judge, I don't think that's a good objection.")
  2. See "First Amended Brief of Appellee," filed in the Texas Court of Appeals; pp.3-5,13,34-46,47,61,65.
  3. See "Answer of Respondent to Application for Writ of Error," filed in the Texas Supreme Court; pp.3,45,46, and 68.
  4. Appellees' "Motion to Dismiss or Affirm," filed in this Court, pp.13,14.

position has caused each court below to render its judgment based on the jury verdict of paternity, Appellee is estopped to assert error in that verdict under state<sup>1</sup> and federal<sup>2</sup> law.

D. THE COURT OF APPEALS LACKED JURISDICTION TO DISREGARD THE JURY'S FINDING OF PATERNITY.

An Appellee in Texas must bring a cross-point to challenge unfavorable findings made by the jury or any error therein is waived.<sup>3</sup> Appellee brought no

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1. Smith v. Chipley, 42 S.W.2d 645 (Tex.Civ.App. 1931, writ refused).

2. Davis v. Wakelee, 156 U.S. 680, 689 (1895).

3. T.R.C.P. 420, Lovejoy v. Lillie, 569 S.W.2d 501, 504-505 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.); Wisdom v. Smith, 209 S.W.2d 164 (Tex. 1948); Jack v. State, 694 S.W.2d 291 (Tex. App.--San Antonio 1985, no writ); Aldrich v. State, 658 S.W.2d 323 (Tex. App.--Tyler 1983, no writ); Jones v. John's Community Hospital, 624 S.W.2d 330 (Tex. App.--Waco 1981, no writ).

such cross-point in her brief before the Court of Appeals.<sup>1</sup>

The case on which Appellees predicate their bold theory of Texas appellate jurisdiction and procedure, Davis v. Jones, 626 S.W.2d 303 (Tex. 1982), did not hold what Appellee claims that it did. That case refused to apply Trimble v. Gordon to its facts because, as it states in plain English:

The facts of the three Supreme Court cases<sup>2</sup> appeared to play a major role in the decisions. Each dealt with relationships between an alleged father and his child. None dealt with grandparents.

626 S.W.2d 306. The Texas court reasoned that "The problems of first generation illegitimacy are magnified many times when the claim is of second, third, or fourth generation illegitimacy." Id. at 309.

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1. "First Amended Brief of Appellee," in the Court of Appeals, El Paso, pp.3-5.

2. Labine v. Vincent, Trimble v. Gordon, and Lalli v. Lalli.

The correct standard for the adequacy of the evidence needed to prove paternity in Texas is "preponderance of the evidence."<sup>1</sup> And even if it were not, the error in submitting issues to the jury on the wrong persuasion standard would have been waived where no objection was recorded at trial. T.R.C.P. 274.<sup>2</sup> Appellees made no such objection in this case.<sup>3</sup> Moreover, the remedy for an error of law as to the proper standard of persuasion to submit to the jury would have been, in

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1. Tex.Fam.Code §11.15, In Interest of J.A.K., 624 S.W.2d 355 (Tex. App.--Corpus Christi 1981, ref. n.r.e.); In Interest of J.J.R., 669 S.W.2d 840, 842 (Tex. App.--Amarillo 1984, no writ); See 1 Ray, Texas Evidence, 3rd Ed., §49, supp. pp. 5-6.
  2. Reed v. Israel Nat. Oil Co., 681 S.W.2d 228, 237 (Tex. App.--Houston [1st Dist.] 1984, no writ).
  3. See S.F. Vol 9, pp.2-3.



both this case<sup>1</sup> and the Davis case,<sup>2</sup> to remand for trial on the correct standard-- not to render the case.

E. THE JURY FINDING WAS SUPPORTED BY CLEAR AND CONVINCING PROOF BEYOND THAT REQUIRED BY THIS COURT IN WEBER.

The proof of paternity in this case far exceeds that needed to support the jury's finding. Appellant's Brief on the Merits summarizes some of this proof at p.7, fn. 1, et. seq. Additional matter germane to contentions of Appellee includes the following:

Prince visited at the hospital after Delynda was born (S.F. 57), chose her name (S.F. 58), and was present and assisted in giving information, including blood-type information, for her birth certificate

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1. In Re King's Estate, 244 S.W.2d 660, 661 (Tex. 1951).

2. Motsenbocker v. Wyatt, 369 S.W.2d 319, 325 (Tex. 1963).

when it was filled out. (SF p. 58; PE1, O&A p.9)

The certificate showed him as her father, and that her birth was legitimate. (SF 58; P.E.1, O&A p.9)

And he explained to his sister that Delynda was his as much as "Prinnie" or "Muggie" (two of the Appellees). (S.F. 428)

Prince Ricker asked to see his daughter Delynda several times and did see her several times when she was an infant. (S.F. 91)

The evidence of paternity was more than this court found adequate in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). In Weber, a possible proof problem as to the second child was pointed out by the Court. This child was born after the father died. The father never had a chance to acknowledge the'

posthumous child or show any awareness of his paternity. Weber found the posthumous child entitled to the same relief as the child that lived with and was cared for by the father.

## II.

UNDER THE CORRECT CHEVRON TEST OF NONRETROACTIVITY, TRIMBLE IS BINDING AUTHORITY.

### A. DECISIONS OF THIS COURT ARE GENERALLY ACCORDED RETROACTIVE EFFECT.

While retroactive application is not compelled, constitutionally or otherwise, this Court noted in Solem v. Stumes, 104 S.Ct. 1338, 1341 (1984) that

As a rule, judicial decisions apply "retroactively." \* \* \* Indeed, a legal system based on precedent has a built-in presumption of retroactivity. (cite omitted)

Because retroactivity is presumed, this Court has no cause to cite Chevron v. Huson, 404 U.S. 97 (1971) in applying precedents retroactively. For example, this Court gave Trimble itself retroactive

application, without citing Chevron, in remanding Lalli<sup>1</sup> and Pendleton<sup>2</sup>. Chevron is this Court's test for non-retro-activity. In the seventeen years since Chevron, this Court has cited it only seventeen times. The small number of cases in which this Court has limited the retroactive effect of its own decisions underscores that the lower court should have accorded Trimble greater deference.

B. ATTEMPTS BY LOWER COURTS TO LIMIT  
THE RETROACTIVE EFFECT OF TRIMBLE  
MUST BE RESPONSIVE TO CHEVRON.

The discretion of the lower courts to limit decisions of this Court to prospective effect is not unbridled,<sup>3</sup> as implied by Appellees Brief, p. 44.

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1. Lalli v. Lalli, 439 U.S. 257 (1978).

2. Pendleton v. Pendleton, 431 U.S. 911 (1977)

3. See Appellant's Brief, pp. 25-32.

The "time of filing" test is particularly objectionable when viewed in the context of the amendments to Probate Code §42.<sup>1</sup> These amendments are designed to continue the disinheritance of nonmarital children whose fathers die after Trimble.

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1. Under state chronological choice of law rules discussed infra, the time test denies heirship where the father died before Trimble, (April 26, 1977), with the sole apparent exception of the claimant in Lovejoy, whose claim was on file when Trimble came down. Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App.--Tyler, 1978, writ ref'd, n.r.e.). The 1977 amendment to Probate Code §42 became effective scarcely a month after Trimble and takes over where the "time" test leaves off. It denies heirship to children whose fathers died between May 28, 1977 and August 27, 1979, except for the miniscule subset whose fathers voluntarily recognized them before dying. The 1979 amendment denies heirship to persons whose fathers die after August 27, 1979, unless the child was born after September 1, 1975, and sued to establish heirship rights within twenty years (originally, one year) from their birth, notwithstanding that there is no right to heirship until after the death of the decedent. Additionally, the 1979 §42 possibly denies heirship to such children if they first apply in probate.

The "time" test attempts to continue bastardy disinheritance against those whose fathers died earlier. As part of an overall grudging state response designed to continue the denial of heirship struck down in Trimble, the "time" test is thus especially suspect.

C. THIS COURT NOTED PROBABLE JURISDICTION IN TRIMBLE NINE MONTHS BEFORE PRINCE RICKER'S DEATH, FORESHADOWING THAT BASTARDY-BASED DENIALS OF HEIRSHIP MIGHT BE STRUCK DOWN

On March 22, 1976, this Court noted probable jurisdiction in the case of Trimble v. Gordon, 424 U.S. 964. This was more than nine months prior to Prince Ricker's death. It was over three months before he returned from a course of treatment at Hazelden clinic, to admit to his sister that Delynda was his daughter. (SF 421-429, 449). Competent counsel advising Prince Ricker about the possibility of Delynda inheriting from him would have



realized that this Court would probably reverse the insurmountable barrier in Trimble, because the rule which Trimble applied--that insurmountable barriers based on illegitimacy are void -- was already well established. A contrary decision in Trimble would have significantly modified the earlier cases in which insurmountable barriers had uniformly been struck down.

D. THE PURPOSE OF TRIMBLE WAS FRUSTRATED BY THE REFUSAL TO APPLY ITS ANALYSIS IN PRINCE RICKER'S OPEN ESTATE.

Appellees have yet to answer the question how the "time" rule, which as legislation would be repugnant to the Constitution under Trimble, can further the purposes of Trimble as a rule of retroactivity.

The orderly leasing of mineral property in probate is governed by Probate Code Part 7, "Mineral Leases, Pooling, or

Unitization Agreements, and other matters relating to Mineral Properties";

§§367 - 372. While Probate Code §188 deals generally with persons who contract with an administratrix in good faith, Part 7 makes more specific provisions for the procedure by which a mineral lease may be obtained while the estate is in administration. The practical effect of holding Trimble retroactive will be to accord Delynda the rights which a legitimate child would have under Chapter 7 with respect to the mineral leases.

E. THIS COURT HAS ALREADY RULED THAT THE RESULT REACHED BY THE "TIME OF FILING" TEST IS ILLOGICAL AND UNJUST.

The third element of the Chevron is whether retroactivity would cause or prevent injustice or hardship. The justice of denying heirship to Delynda because of her status of birth presents no question of

first impression. Imposing such disabilities on children because of their status of birth was weighed by this Court and rejected as "illogical and unjust" in Trimble.

Weighing the hardship under Chevron, the economic deprivation to Delynda is compounded by the stigma of illegitimacy which state law imposes on her. Retroactive application of Trimble will remove some of the legal sanctions which still reinforce this stigma.

### III.

SUBJECT TO THE REQUIREMENTS OF EQUAL PROTECTION, THE ENACTMENT OF §42 IN FORCE WHEN PRINCE RICKER DIED APPLIES TO HIS ESTATE.

Under Texas law, the lower court was correct in selecting the 1956 enactment of §42 as applicable to the estate of Delynda's father. Because Prince Ricker died in 1976, The 1956 enactment is appli-

cable under the Texas Constitution,<sup>1</sup>

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1. As this Court noted in Mills v. Habluetzel, 456 U.S. 91, 95 n. 1, (1982), Article I, Section 16 of the Constitution of the State of Texas forbids retroactive laws. Section 16 provides: "No retroactive law shall be made." (Vernon 1984).

The Texas Constitution's invalidation of retroactive laws is especially sensitive where vested rights are concerned. In Cox v. Schweiker, 684 F.2d 310, 318 (5th Cir., 1982) the court held that applying the amended statute would be an attempt to divest inheritance rights which had vested under Lalli and the pre-amendment statute, and thus "amount to a retroactive interference with vested rights, a result expressly forbidden under Georgia constitutional law."

statutes<sup>2</sup>, and court decisions.<sup>3</sup>

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2. The enacting legislation of the amendments provides that they shall be effective, respectively, on May 28, 1977, and August 27, 1979.

Probate Code §37 provides that when a person died intestate in Texas, all of his estate vests immediately in his heirs at law. Under §37, the 1956 §42, rather than the amendments, applies to estates of decedents dying before 1977. Jones v. Davis, 616 S.W.2d 276, 277 (Tex. App.--1981 Houston [1st Dist.]), rev'd on other grounds; Davis v. Jones, 626 S.W.2d 303 (1982); Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980).

3. Davis v. Jones, 626 S.W.2d 303, 305 (Tex. 1982) applied the 1956 §42 to the estate of the first decedant, who died in 1960, noting that "before 1977, an illegitimate child could inherit, under the Texas statutes, only from the mother". To the estate of the second decedent, who died in 1978, Davis held the 1977 amendment to apply, reasoning at p. 305:

"The legislature, in 1977, amended Section 42 of our Probate Code to provide for alternate methods making children legitimate. The statute was amended again in 1979, but since Warren Sr. died in 1978, we are concerned with the constitutionality of the 1977 statute."

## IV.

THE 1977 AND 1979 AMENDMENTS TO §42, IF APPLIED TO DELYNDAS HEIRSHIP RIGHTS, RETROACTIVELY POSE INSURMOUNTABLE STATUTORY BARRIERS TO HER RIGHTS UNDER TRIMBLE.

The exclusions of the 1977 and 1979 amendments, as applied to Delynda, are insuperable. In its zeal to cabin Trimble, the predominately male legislature drew too narrowly in drafting both the 1977<sup>1</sup> and the 1979<sup>2</sup> amendments. Indeed, it was apparent that the attempted restrictions on Trimble were probably unconstitutional before the legislature enacted them.

The 1977 amendment to Probate Code §42 adopted the voluntary legitimation procedure of the Family Code. As this Court noted in Mills, the voluntary

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1. Appellant's Brief, pp. 91-93, 95-96.

2. Brief pp. 97,98, 72-91.



legitimation provisions of the 1974 Family Code amendment were a legislative attempt to limit the support right recognized in Gomez. The voluntary procedures were rejected as too confining to deny the Gomez support right in In re: R-- V-- M--, 530 S.W.2d 921, 922-923 (Tex. Civ. App.--Waco 1975, no writ). Despite this, the legislature engrafted the same inadequate voluntary procedure into Probate Code §42 and deprived Trimble of any significant practical effect.

The 1979 amendment to §42(b) gave children born after September 1, 1975, and whose fathers died after August 27, 1979, the right to bring suit within one year of birth to establish heirship. For those accorded access to the one year period the statutory right was more than purely illusory. Still, the practical effect of the 1979 amendment amounts merely to a more

sophisticated attempt to emasculate Trimble. Before its enactment, nonmarital children had Trimble rights under either the 1977 enactment of §42 or, subject to the "time of filing" test, the 1956 enactment. In effect, the 1979 amendment attempted to nullify the right which Trimble had recognized by hampering it with a one-year-from-birth statute of limitations. The 1979 amendment may have conditioned even the one-year period on the survival of the father, although Texas courts have not decided this question.

Applied to Delynda, the most significant factor of the 1979 amendment is that it adopted the Family Code's exclusion of persons born before September 1, 1975. The outright exclusion to those born before September 1975 was recognizable in

1979 as a denial of Equal Protection under the analysis of Trimble itself.

Appellees have argued that the 1979 barrier was surmountable as to Delynda because she could have been accorded an Equal Protection Wynn action against her natural father while he was alive. The Wynn action exists solely because of the insuperable burden to child support struck down in Gomez. An insuperable statutory barrier is not a statutory "reasonable opportunity" for the purposes of Equal Protection. If such circular logic were the rule, the "reasonable opportunity" requirement of Mills would be meaningless.

Two factors peculiar to the Probate context accentuate the unfairness inherent in Chapter 13 as applied to Delynda's heirship rights. First, there was no notice that any probate significance would be accorded a Family Code action before

the 1979 amendment, when Delynda's father was already dead. Second, heirship does not accrue as a substantive right until the death of the decedant. Probate Code §72(a). Texas follows the rule that "no one is heir to the living" and refuses to settle the probate of living persons.

Applying the 1979 statute to deny Delynda's Trimble heirship would violate Due Process, as well as Equal Protection. Delynda's right to inherit from her father vested under the Fourteenth Amendment at the time of his death. That right was a valuable property right<sup>1</sup> which the state could not disturb without affording her notice and an opportunity to be heard.<sup>2</sup>

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1. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

2. Boddie v. Connecticut, 401, U.S. 371 (1971).

Prince Ricker died December 22, 1976. (J.A. 6). The 1979 amendment to §42 was enacted when Delynda's father was already dead. Delynda had no notice that the unattainable Family Code action would be required for her heirship at any time that her father was alive. In addition to violating the prohibition of the Texas Constitution against retroactive statutes, such a provision would also deny her Due Process. Assuming that the Family Code requirements become a bar to heirship if not asserted during the father's life, the lack of notice gave Delynda no chance to attempt to comply with its provisions. If the 1979 incorporation of the Chapter 13 action into the Probate Code means that it is available after death, Delynda has complied with its sole constitutional requirement. She is thus an heir either

under the statute or by virtue of its invalidity.

V.

DELYNDA'S INTERESTS IN BEING LEGITIMATED AFTER HER FATHER'S DEATH OUTWEIGH STATE INTERESTS IN DENYING SUCH LEGITIMATION.

Delynda's is entitled as a matter of Equal Protection to an order designating Prince Ricker as her father.

A. THE FAMILY CODE AFFORDS SIGNIFICANT LEGITIMATION RIGHTS

A child who falls within Chapter 13 of the Family Code and secures a jury finding of paternity is entitled to such an order as a matter of right. Family Code §13.08(a) provides:

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

The effect of the mandatory order is legitimation. Section 13.09 provides:



The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.

In addition to child support, the court may award reasonable attorney's fees incurred in the suit. Family Code §13.42(b). Heirship rights are created if the applicable statutory limitations do not prevent them. Probate Code §42(b)(1979); Family Code 12.04(9). Delynda does not seek support, and her heirship rights vest with reference to the 1956 statute, so that neither is in question here.

Delynda has secured a jury verdict that Prince Ricker is her father. (J.A. 63). Unless a valid state classification bars her right to legitimation, she is entitled to relief fully equivalent to that granted by Chapter 13.

B. THE CLASSIFICATIONS EXCLUDING DELYNDIA FROM LEGITIMATION WERE INVIDIOUS.

The September 1, 1975 effective date of Chapter 13 has insurmountably barred Delynda from Chapter 13 relief, suit, and it must therefore be set aside under Mills v. Habluetzel.

The retroactive limitations provisions of the Family Code §13.01 either allow Delynda's suit or they are void. When the one-year version of this statute was enacted on September 1, 1975, Delynda was more than one year old. When the four-year version was enacted on September 1, 1981, she was more than four years old. And when the twenty-year version of this statute was enacted on June 19, 1983, Delynda was more than twenty years old.<sup>1</sup>

Thus §13.01 either allows Delynda's legitimation in the present action or its

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1. Delynda was born November 1, 1958.  
(S.F.57,12)

barrier was insurmountable and void as a matter of both Equal Protection and Due Process. In neither case is it a valid obstacle to Delynda's legitimation.

Delynda's right to legitimation is clearly available not withstanding whether the state courts rule that a Chapter 13 action is available after the father's death. If the statutory action is not barred by death, then Delynda has maintained it here successfully. If not, it is another insurmountable barrier. In either event, the death of Delynda's father is not a constitutional bar to her legitimation. Since there is no valid state classification justifying the availability of Chapter 13 relief to others while it is denied to Delynda, she is entitled to an order designating Prince Ricker as her father.

C. TEXAS HAS NO INTEREST IN ENFORCING THE NAKED STATUS OF ILLEGITIMACY, AND CAN HAVE NO INTEREST IN DENYING A FAMILY CODE ACTION AFTER THE FATHER'S DEATH.

Texas courts have never construed Chapter 13 legitimation as unavailable after the father's death. The statute itself is silent as to whether the action may be maintained after the father's death. See, e.g., In the Interest of B.M.N., 570 S.W.2d 493 (Tex. Civ. App. --Texarkana 1978, no writ). Thus, the state has asserted no interest in enforcing the status of bastardy simply because the father is dead.

Moreover any state interest in enforcing the mere status of bastardy would not be permissible under the decisions of this Court. Delynda's right to Family Code legitimation involves none of the delicate state interests involved in her claim to heirship under §42 of the

Probate Code. The legitimation decree sought in her case would have no bearing on the interest in orderly probate or title to real estate.

This Court has repeatedly rejected the encouragement of legitimate family relations as illogical, unjust, and impermissible. Only the orderly settlement of estates and the prevention of stale or fraudulent claims for support have been found, in Trimble and Pickett, to justify the imposition of statutory burdens based on bastardy. Because Delynda claims no support right, and because her heirship is settled under the 1956 statute without reference to the Family Code, such state interests are lacking in this case.

D. LEGITIMATION, AND THE REASONABLE FEES NECESSARY TO SECURE IT, ARE SUBSTANTIAL RIGHTS.

1. FREEDOM FROM THE STIGMA OF BASTARDY IS A SUBSTANTIAL LIBERTY INTEREST.

As Appellee notes in her brief, at

common law an illegitimate child had no rights of inheritance. "The harsh result was that such a child was considered nullius fillius, the child of nobody." (B.A. p. 46)

The historical discrimination perpetuated by this law can only be interpreted as imputing lesser worth to the illegitimate children. And the denoting of inferiority by law and society can only create within the faultless children themselves a diminution of feelings of self worth. The historic and ongoing social opprobrium attached to the status of illegitimacy has been shown to have an effect on children.<sup>1</sup>

One study has found that illegitimate children, when compared with legitimate children of similar economic status,

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1. Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971).



showed differences in "adjustment," as well as lower IQs and lower scores on the California Test of Personality. The study also found greater differences between the two groups as the children grew older, hypothesizing that the illegitimate children became increasingly aware of their socially inferior status.<sup>1</sup>

It is clear that Delynda was deprived of substantial benefit under Texas' Family Code, Chapter 13 when it granted to illegitimate children a right to sue their natural fathers for legitimation, yet denied it to her.

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1. Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958).

2. REASONABLE ATTORNEY'S FEES NECESSARY  
FOR THE LEGITIMATION ACTION ARE A  
VALUABLE DUE PROCESS AND EQUAL  
PROTECTION RIGHT.

The Texas Family Code recognizes that "establishment of paternity is the necessary first step in all suits by illegitimate children for support from their natural fathers." Mills v. Habluetzel, 456 U.S. 91, 94 (1982). The 1979 amendment to Probate Code §42 denies heirship to illegitimate children absent such proof of paternity. Legitimate children, by contrast, need prove only maternity and marriage to be accorded the same rights. The Texas statutes impose on illegitimate children the burden of potentially lengthy and costly court proceedings, to which the rights of legitimate children are not subjected. It is appropriate and fitting that the legislature, in Family Code §13.42(b), has made an award of reasonable attorneys fees available to

alleviate some of the potential burden which Texas statutes impose. This award is denied to Delynda by the same classifications as legitimation itself.

This Court has repeatedly held that the right to be heard prior to a deprivation of property under state law is a fundamental Due Process right.<sup>1</sup>

Specifically, this Court has held that the right to counsel is required in order to be heard effectively in a suit affecting the parent-child relationship. Lassiter v. Dept. of Social Services of Durham Co., 452 U.S. 18, 31 (1981).<sup>2</sup>

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1. E.g. Boddie v. Connecticut, 401 U.S. 220 (1971); Matthews v. Eldridge, 424 U.S. 319 (1976). For the proposition that a cause of action for legitimation is a property right, see Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

2. See also Little v. Streater, 452 U.S. 1, 13 (1981) (right of indigent to costs for blood tests in suit to establish parent-child relationship).

The award of fees under §13.42(b) of the Family Code is discretionary. This case presents strong equitable reasons that the award should be allowed. Delynda has incurred heavy fees which have been necessary and reasonable in carrying this case through trial and three levels of appeal. There has been no question of her paternity ever since the jury rendered its verdict. Appellees have sought to prevent her heirship by avoiding this Court's mandate. The time of filing test has been implicitly acknowledged from the first to be one repugnant to the Fourteenth Amendment, because the issue from the summary judgment stage has been whether Trimble v. Gordon would apply.

Certain illegitimate children are granted the right to a discretionary award of attorneys fees incurred in establishing their paternity. The same

award is denied to Delynda by Chapter 13. The attorney's fee benefit Delynda has been deprived of is substantial.

E. DELYNDA'S CLAIM IS FACTUALLY AND LEGALLY DISTINCT FROM THE SITUATION PRESENTED IN LALLI V. LALLI.

In Lalli v. Lalli, 439 U.S. 259 (1978), the Court had before it a New York statute which provided the claimant a lifetime action. In the case at hand, Chapter 13 has totally excluded Delynda from bringing any action while her father was alive. Her action was conclusively barred by her date of birth.

The statute in this case is thus like the statute in Trimble v. Gordon, 430 U.S. 762 (1977), rather than the statute in Lalli. The Trimble statute was struck down because it provided only an insuperable barrier to heirship, in that there was no lifetime action which would avail Deta Mona Trimble of heirship. She was

therefore allowed to prove paternity for that purpose after her father's death.

Like the Illinois statute in Trimble, the Texas Family Code never provided Delynda a lifetime action.

The statute in Lalli provided clearly that the filiation action could be brought only while the father was alive. In Texas, no similar statutory provision warned Delynda of the need to bring the unavailable paternity claim while her father was alive. Denying Delynda's claim to legitimation would therefore violate Due Process, because she was given no notice of the nonexistent lifetime action, and no opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371 (1971).

In Handley v. Schweiker, 697 S.W.2d 999 (11th Cir. 1981), there was only judicial precedent which required that the action be brought while the father lived. Handley set this precedent aside, noting



that it did not merit the deference reserved for the New York legislative enactment. In the case at hand, there is only the chance that Texas may interpret the ambiguous statute as requiring lifetime action. This hypothetically possible future holding does not merit more deference than did the precedent set aside in Handley.

F. THE FINDING OF PATERNITY IN THE PRESENT ACTION ENTITLES DELYNDA TO A DECREE DESIGNATING PRINCE RICKER AS HER FATHER, AND AUTHORIZES AN AWARD OF REASONABLE ATTORNEY'S FEES.

It is not necessary for this Court to construe Family Code Chapter 13 to decide that Delynda is entitled to legitimation. The only possible constructions of the Code which could deny legitimation in this case would be unconstitutional. Thus, regardless of the interpretation which the state courts may later make of the statute, Delynda's right of legitimation is not defeated. This Court is thus fully

authorized to enter its Decree--with the full effect of a Family Code decree--designating Prince Ricker as Delynda's father, and to award Delynda the right to discretionary attorney's fees as prayed. Both legitimation and attorneys fees are valuable, substantial rights and fully within the cognizance of Equal Protection.

## VI

## DELYNDA HAS STANDING.

Appellees' statement that "the present case involves a class of one" is exaggerated, but irrelevant, because even a small class has standing. Kirchberg v. Feenstra, 101 S.Ct. 1195 (1981).

Delynda has standing to assert her sex discrimination point. Craig v. Boren, 429 U.S. 190 (1977); Lowell v. Kawalski, 405 N.E.2d 135, 139 (Mass. 1980).

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REQUEST FOR RELIEF

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Appellant requests this Court, pursuant to its authority under 28 U.S.C. 2106, to enter an order, or alternatively to issue a Mandate to the appropriate state court requiring that it issue an order:

1. Granting Appellant's Application for Heirship in her father's estate;

2. Declaring that the Fourteenth Amendment affords Delynda a right to inherit from her father equal to that afforded a legitimate child under the Texas Probate Code;

3. Designating Prince Ricker as Delynda's father as a matter of Equal Protection, with the full effect of the mandatory order provided in §13.08 of the Texas Family Code;

4. Awarding Delynda pre- and post-judgment interest pursuant to Rule 49 of the Rules of this Court, as measured by the trial court under the rule of Cavner v. Quality Control Parking, Inc., 697 S.W.2d 549 (Tex. 1985);

5. Declaring an award of attorney's fees is authorized and should be made to Delynda in an amount to be determined by the trial court, under the Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§37.005 and 37.009 and as under Texas Family Code §13.42(b); and

5. Taxing the costs in this matter to Appellee, as provided by Rule 50.2 of the rules of this Court.

Pursuant to 28 U.S.C. 2106, Appellant

prays for such further relief as may be  
just under the circumstances.

Respectfully submitted,

R. Stephen McNally  
Counsel for Appellant  
P.O. Box 1586  
Austin, Texas 78767-1586  
(512) 474-1397

The briefing assistance of James C.  
Thompson is gratefully acknowledged.

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## APPENDIX

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FROM RECEIPT OF THE VERDICT UNTIL THEIR BRIEF ON THE MERITS IN THIS COURT, APPELLEES HAVE TAKEN THE POSITION THAT DELYNDIA IS PRINCE RICKER'S NATURAL, ILLEGITIMATE, CHILD.

Before the case was submitted to the jury, Appellees complained that there was inadequate evidence to support the submission of every special issue except number one. Regarding issue 1 --whether Delynda was Prince Ricker's child -- attorney for Appellees began to dictate an objection that the evidence of paternity was insufficient. Then he stopped, and said (SF V.9, p.3): "Judge, I don't think that's a good objection. We will just forget that objection."

Further, Appellees did not object to the submission of paternity to the jury "by a preponderance of the evidence." Appellees point out in their Answer to the Application for Writ of Error to the Texas Supreme Court, p. 45, 46:

It is well settled that when an issue is submitted, the parties are put on notice that the jury's answer to the issue submitted will, if supported by the evidence, form the basis for the Court's judgment, and it is the duty of each party to point out the errors in the charge or be held estopped



from thereafter urging them. (cites omitted).

The jury returned its finding that Delynda is the child of Prince Ricker. (J.A. p. 63).

In their trial court response to Delynda's motion for judgment, Appellees stated (J.A. p. 77):

The finding by the Jury to Special Issue Number 1, that Plaintiff was the child of Prince Rupert Ricker, merely establishes Plaintiff as the illegitimate child of Prince Rupert Ricker.

In their First Amended Brief in the El Paso court of appeals, Appellees stated their Reply Point No. 2 as follows (p. 47):

THE TRIAL COURT CORRECTLY GRANTED JUDGMENT FOR APPELLEE, BECAUSE THE MERE FINDING THE APPELLANT WAS THE CHILD OF PRINCE RICKER DOES NOT ESTABLISH HER LEGITIMACY OR ENTITLE HER TO INHERIT, AND HER RIGHTS HAVE NOT BEEN ABROGATED BY ANY STATUTE OR DOCTRINE OF EQUAL PROTECTION; AND, IN ANY EVENT, APPELLANT'S CLAIM FOR PATERNITY IS BARRED BY THE FOUR YEAR STATUTE OF LIMITATIONS.

At p. 13 of their Amended Brief in

the El Paso appeals court, Appellees stated:

Thus, our contention is that any relationship that may have existed between Prince Ricker and Annabel Boutwell was merely meretricious and no marriage at all.

That being the case, the jury's answers leave but one conclusion, and that is that Appellant was an illegitimate child.

In their briefs in the court below, Appellees did not present nor brief evidence points challenging the first three findings: Delynda is Prince Ricker's child, Prince Ricker ceremonially married Delynda's mother eleven months before Delynda was born, and then agreed with Delynda's mother to be her husband.

Rule 420 Tex.R.Civ.Proc., provides:

[I]n case the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.

Rule 418(d) begins:

(d) Points of error. A statement of the points upon which the appeal is predicated shall be stated in short form without argument and be separately numbered.

The rules are still more specific where the jury's charge is challenged, as by Appellees' assertion that a non-preponderance standard of proof should have been applied. Rule 418(e) requires:

\* \* \* If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. \* \* \*

As Appellees urged in their answer to Delynda's Application for Writ of Error to the Texas Supreme Court, p. 99:

Rule 418(e) of the Texas Rules of Civil Procedure requires that the points of error upon which Petitioner relies be briefed, containing a fair statement of the facts relevant to the point of error and a discussion of the facts and authorities relied upon to maintain the point in issue. And, it has long been an established rule of appellate procedure that assignments of error not briefed are waived. (cites omitted)

Appellees' failure to present and brief evidence points assailing the first three findings deprived the lower court of jurisdiction to hear re-argument of the facts. The court of appeals was thus

without jurisdiction to reject the finding of paternity. Lovejoy v. Lillie, 569 S.W.2d 501, 504-505 (Tex. Civ. App.-- Tyler 1978, writ ref'd). In Lovejoy, the appellee failed to present an evidence point in his brief contesting the trial finding of paternity, and was held to have waived any challenge on appeal. The Lovejoy claimant inherited under Trimble.

Appellees' answer to Delynda's Application for Writ of Error to the Texas Supreme Court is similarly inconsistent with the current "no paternity" position. Reply Point 3 states:

THE COURT OF APPEALS CORRECTLY FOUND PETITIONER TO BE ILLEGITIMATE BECAUSE THE MERE FINDING THAT PETITIONER WAS THE CHILD OF PRINCE RICKER DOES NOT ESTABLISH HER LEGITIMACY OR RIGHT OT INHERIT.

On p. 68, Appellees amplified:

The Jury's finding that Petitioner was the child of Prince Ricker in no way determines the issue of whether Petitioner was the legitimate or illegitimate child of Prince Ricker or whether Prince Ricker recognized Petitioner as his child.

Five of Appellees' nine Reply Points in the Texas Supreme Court answer began with the words: THE COURT OF APPEALS CORRECTLY FOUND PETITIONER TO BE ILLEGITIMATE BECAUSE. . .

Significantly, these arguments, which were made after the alleged finding of "no

paternity" by the appeals court, cannot be reconciled with it. Instead, Appellees' answer in the Texas Supreme Court affirms that the court of appeals found Delynda the "illegitimate," ergo natural, child of Prince Ricker.

Even Appellees' Motion to Dismiss or Affirm in this Court, at p.13, part III., restates without comment the jury's finding that "Appellant was the child of Prince Ricker, Deceased." In reviewing the "Holdings of the Court Below" (part IV, p. 14), Appellees' Motion to Dismiss or Affirm contains no hint of an alleged finding of "no paternity." Instead, the motion summarizes with substantial accuracy what the lower court actually did: it affirmed the judgment of the trial court that Delynda was "illegitimate and incapable of inheriting from the intestate estate of Prince Ricker, Deceased," by holding the Mexican marriage was void and did not ripen into a common law or putative marriage, and that Delynda was not a "recognized" illegitimate, and that recognition (which is not in Section 42(b) of the Probate Code), is not a method by which an illegitimate child can inherit. It held that Trimble would not be applied retroactively to the applicable 1977 Section 42(b), and that even if she could claim under the amendment, a "rational state basis supports that legislation."

The same language was interpreted inconsistently by Appellees. In their Motion to Dismiss or Affirm, it was a finding Delynda was not a "recognized" illegitimate, and that the marriage of her parents did not ripen into a common law or

putative marriage. In Appellees' Brief on the Merits the same language was quoted out of context to support an attempt to re-argue the fact of paternity. The quoted words must be viewed in their context in the lower court's opinion itself. The language quoted is shown by its context to be a response to Delynda's points urging that the evidence established that Prince Ricker recognized the fact that he was her father, and urging that the evidence established a common law or putative marriage of her parents.